Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LEW WARDEN,

Petitioner,

vs

THE STATE BAR OF CALIFORNIA,
LORNA MAYNARD, CAROLE ROSSI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the
State of California

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

The State Bar of California, pursuant to a mandatory continuing legal education program, summarily suspended petitioner's license to practice law for non-compliance, raising the following questions presented for review:

1. Does a Rule of Court which requires certain members the State Bar, as a condition of their right to continue to practice law, to engage in courses of study approved by the State Bar, while exempting from such burden other members who are retired judges, State officers and elected officials, certain law school professors, and employees of the State of California and the federal government acting within the scope of their employment, violate the Equal Protection Clause of the 14th Amendment of the Constitution?

2. Is the right to practice law, once granted by a state, a fundamental right of a citizen of that state protected by the Citizenship, Equal Protection, and Due Process Clauses of the 14th Amendment?

3. By suspending petitioner's right to practice law, without first affording him a hearing, for failing to comply with its continuing legal education program, did the California State Bar violate the Due Process Clause of the 14th Amendment?

4. By suspending petitioner's right to practice law for failing to perform 12 hours of study approved by the State Bar, did the California State Bar violate the Due Process Clause of the 14th Amendment?

(Questions, cont.)

5. By suspending petitioner's right to practice law for failing to perform 12 hours of study approved by the State Bar, did the California State Bar violate the Excessive Fines and Cruel and Unusual Punishment Clauses of the 8th Amendment?

6. Where the enabling statute and rule of court permit all affected members of the State Bar of California to perform 36 hours of approved study within a 36 month period, did the State Bar of California violate the Equal Protection Clause of the 14th Amendment by suspending his right to practice law for failing to perform 12 hours of such study within a 12 month period while other members were extended a period of 24 months within which to perform 24 hours of such study, and yet other members were extended the full period of 36 months within which to perform 36 hours of such study, before suffering suspension?

7. Should the Court, in the event it finds petitioner's constitutionally guaranteed rights have been infringed in any particular, direct the California court to allow petitioner's cause of action for damages under 42 U.S.C. sec. 1983 to proceed to trial?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California which petitioner asks this Court to review, was filed and entered on August 26, 1999. (Appendix A, pp. 1-65.) It is published as Warden v. State Bar (1999) 21 Cal.4th 628, 88 Cal. Rptr.2d 283, 982 Pac.2d 154.

The opinion of the California Court of Appeal, First Appellate District, which the California Supreme Court, in large part, reversed, was filed March 13, 1997. (App. B, pp. 66-121.) It is published as Warden v. State Bar (1997) 62 Cal.Rptr.2d 32.

The summary judgment of the Superior Court for the State of California, County of Alameda, which the California Supreme Court sustained, was filed October 18, 1995. (App. D, pp. 123-124.) The Superior Court's order making findings upon which its judgment is based was filed September 14, 1995. (App. D., pp. 125-127.) The judgment and order were not published.

JURISDICTION

The judgment of the California Supreme

Court was entered on August 26, 1999. Timely petition for rehearing was denied on October 20, 1999. (App. C, p. 122.)

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution:

Article IV, sec. 2, cl. 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment V: No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Statutes and Rules:
Business & Professions Code

Section 6070, directing State Bar to request Supreme Court to adopt a mandatory continuing legal education program, is set forth in Appendix E, pp. 128-129.

Section 6125, limiting the practice of law to active members of the State Bar is set forth in Appendix E, p. 129.

Rules of Court

Rule 958, authorizing State Bar to establish and administer a minimum continuing legal education program, is set forth in Appendix F, pp. 130-131.

State Bar Rules

State Bar MCLE Rules and Regulations are set forth in Appendix G, pp. 132-139.

STATEMENT OF THE CASE

A. California's Mandatory Continuing Legal Education program.

The proceedings before the California courts arose out of a mandatory continuing legal education program (herein MCLE) which the California Legislature and the Supreme Court of California in 1989, at the request of the California State Bar, authorized the State Bar to establish and administer. (Op'n Cal. Supreme Court, App. A, pp. 3-9.)

That same year the State Bar adopted its Rules and Regulations governing the MCLE program. The expressly stated purpose of the program was to "assure that, through-out

their careers, California attorneys [not specifically exempted] **remain current** regarding the law, the obligations and standards of the profession, and the management of their their practices." (Rule 1.0, App. G, p. 132, emphasis added; cf. App. A, p. 3, where the the California Supreme Court concluded that MCLE's purpose is to "enhance competency.")

By subsection (a) of Bus. & Prof. Code sec. 6070, the California Legislature directed the State Bar to "request" the California Supreme Court to adopt a rule authorizing the State Bar to establish and administer a MCLE program, which applied to "all active members of the State Bar." However, subsection (c) exempted "retired judges, officers and elected officials of the State of California, full-time professors at law schools accredited by the State Bar of California [or] the American Bar Association . . . [and] full-time employees of the State of California, acting within the scope of their employment".

Although initially, the State Bar had asked for a program which applied to all members of the State Bar, without exception, when the matter was proposed to the state Legislature, there was opposition from legislators who "'didn't want to be dragged into a classroom.'" (Op'n, Court of Appeal, App. B, p. 81.) The exemptions for retired judges and law professors followed from expressions of similar sentiments. (Ibid.)

Pursuant to the State Bar's request, the California Supreme Court then adopted Rule 958 incorporating the exemptions specified by the Legislature, and, in response to "public comment", adding exemptions for full-time time employees of the United States Government acting within the scope of their

employment and for such other attorneys as might be exempted by the State Bar. (App. A, pp. 5-7.)

Pursuant to Rule 958, the State Bar adopted its MCLE Rules & Regulations which incorporated the exemptions specified by Section 6070(b) and Rule 958. A committee of the State Bar then interpreted the grant of exemption to members who are "retired judges" to extend to retired judges of courts other than the State of California. (App. A, pp. 10-11, fn. 5.)

Section 6070(a) and Rule 958(c) specified that each non-exempt member must complete 36 hours of legal education approved by the State Bar within designated 36 month periods, and required that of such 36 hours, eight must be in law practice management and legal ethics. (App. E, F, pp. 128, 130.) Rule 958(c) authorized the State Bar to require legal education in "other specified areas." (App. F, p. 130.)

The State Bar MCLE rules added the requirements that at least one of the 36 hours of approved study must "relate to prevention detection, and treatment of substance abuse and emotional distress", and that at least one of such 36 hours must "relate to elimination of bias in the legal profession", including but not limited to bias as to "sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation." (App. G, p. 132.)

The State Bar divided its membership into three groups, classifying the members of each group according to the initials of their last names and requiring that, for the first year the program was in effect,

the members of the first group, which included petitioner, must complete 12 hours of study by January 31, 1993, the members of the second group must complete 24 hours of study by January 31, 1994, and the members of the third group would have until January 31, 1995, to complete the full 36 hours of study for the first three year period. (App. G, pp. 133-134.)

Both section 6070(c) and Rule 958(d) provide that a member who fails to "satisfy" the "requirements" of the program "shall be enrolled as an inactive member . . . under rules adopted by the Board of Governors." (Apps. E, F, pp. 128, 131.) Rule 958(e) added that the State Bar shall have the authority to "set and collect appropriate fees and penalties." (App. F, p. 131.) However, although the State Bar Rules specify some five different acts which constitute noncompliance (App. G, pp. 136-137), the sole penalty set for of any one of these acts is enrollment as an inactive member of the State Bar. (App. G, p. 137.)

To lawfully practice law in California one must be an active member of the State Bar. (App. E, p. 129.

Although the MCLE rules provide for due process hearings for certain providers of legal education before their status as approved providers may be revoked (App. G, p. 136), they expressly provide that enrollment as an in active member for failing to comply with the rules is "administrative in nature and no hearing is required." (App. G, pp. 138-129.)

One enrolled as an inactive member for failing to comply with the MCLE rules is still required to pay State Bar membership fees.

(App. G, p. 139.)

There are no studies determining whether exempted members of the State Bar are more competent, knowledgeable, or current in the law or the subjects of required legal study, than non-exempt members. (App. J, Fact #84, p. 176.)

There are no studies determining whether the MCLE program has resulted in any improvement in the competency or currency of compliant members. (App. J, Fact #88, p. 177.)

B. The Impact of The State Bar's MCLE Program on Petitioner and Others Similarly Situated.

At the time of his suspension from the practice of law in July, 1993, petitioner, then 73 years of age, had been a member of the California State Bar since 1953, and was admitted to practice before all California courts, the federal courts for the Northern, Central, and Southern Divisions of California, the Tax Court of the United States, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court. (App. J, Facts ##1, 2, pp. 153-154.) At all times petitioner had been in good standing with the State Bar, without any censure, public or private. (Id., Fact #3, p. 154.)

At the time of his suspension, petitioner's sole means of earning the livelihoods of himself and his wife was by the practice of law. (Id., Fact #4.) Petitioner believed that Rule 958 and Bus. & Prof. Code sec. 6070 gave him a period of three years within which to comply with the 36 hours of required study or retire from the practice of law, and that the classifications of the initial

compliance periods disfavored him and other similarly situated members over members with different last name initials. (Id., Fact #138, pp. 188-189.)

On July 19, 1993, petitioner and some 412 other members of the State Bar were summarily suspended from practice for failing to comply with the MCLE rules for the first year the program was in effect. (Id., Fact #23, p. 159.)

After suspending petitioner and the other disaffected members, the State Bar sent notices to some 588 courts, agencies, and bar associations throughout the United States by a form which lumped members who were suspended for failing to comply with MCLE requirements with other members who had been disbarred or otherwise disciplined for ethics violations, which caused a federal judge to refer to petitioner as a "disbarred" attorney when he called the matter in his courtroom. (Id, Facts ## 23, 24, 123, 124, pp. 159, 184-185.)

On May 2, 1994, petitioner filed complaint in the California Superior Court for the County of Alameda against the State Bar and three individual employees, alleging that he had been summarily suspended from practice by the State Bar for failure to comply with its MCLE program, that such suspension violated his rights to procedural and substantive due process of law and to the equal protection of the laws and that he had suffered damages compensable under section 1983 of the federal Civil Rights Acts. (App. H, pp. 140-150.)

After extended discovery, respondents moved for summary judgment, asserting, on the authority of Lupert v. California State

Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328, cert. denied 474 U.S. 916, that there is no fundamental right to practice law. Respondents further asserted that the pertinent statute and rules were subject to equal protection review meeting only the rational basis standard, that petitioner had received adequate notice that he would be suspended if he failed to comply, that a hearing was not required because there were no issues of fact to be resolved, and that the State Bar and its employees were immune from liability in any event.

Petitioner opposed respondent's summary judgment, asserting, on the authority of Supreme Court of New Hampshire (1984) 470 U.S. 274, 280-281, and Lebbos v. Judges of Super. Ct., Santa Clara County (9th Cir. 1989) 883 F.2d 810, 818, that the right to practice law, once established, was a fundamental right protected by the Privileges and Immunities and Due Process Clauses of the federal Constitution, that the equal protection issues called for strict scrutiny but that the discriminations shown could not pass rational basis muster in any event, that a hearing was appropriate to resolve the constitutional issues, and that respondents were not immune under federal law.

The Superior Court granted summary judgment on all points raised by respondents. (App. D, pp. 123-127.)

C. Petitioner's Contentions in the Courts Below, and Their Responses.

1. Petitioner contended at all stages of the proceedings below that the State Bar's MCLE program and the manner in which it was applied to him and other members of the State Bar similarly situated violated the Equal

Protection Clause of the 14th Amendment in the following particulars:

a. That the exempting of members of the State Bar who are full-time law professors of State Bar or American Bar Association accredited law schools, retired judges of California courts and the courts of other jurisdictions, state officers and elected officials, and full-time employees of the State of California and the federal government, from the burdens of the MCLE program violated petitioner's right to the equal protection of the laws. (App. H, pp. 144-145; App. I, pp. 151-152; App. J, Facts ##42-57, pp. 164-168; App. K, p. 192; App. L, p. 194; App. O, pp. 199-201.)

(1) The trial court's disposition of the exemptions/equal protection issue.

Without specific reference to the exemptions issue, the trial court found that there was no evidence that petitioner had been denied equal protection. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the exemptions/equal protection issue.

The three-justice Court of Appeal panel rejected petitioner's contention that because his fundamental right to earn a living by practicing law had been infringed, a strict scrutiny test was required. (App. B, pp. 77.) Instead, it decided that its obligation was to determine whether the classification scheme bore a "rational relationship to a legitimate state purpose." (Ibid.) However, in doing so, the court held that it was obliged to conduct a "serious and genuine judicial inquiry" (Id, p. 78.)

Thus, the court considered the legislative history of section 6070 and concluded that the exemptions for officers and elected officials, retired judges, and law professors been granted because of the opposition of members of such groups to being burdened by compulsory classroom study. (Id., pp. 79-81.) The court decided that this did not constitute a "rational" basis for the exemptions, and, finding no other, unanimously held that the exemptions of law professors, retired judges, and state officers and elected officials violated the equal protection clause of the federal Constitution. (Id., pp. 79-89.)

(3) The California Supreme Court's disposition of the exemptions/equal protection issue.

The California Supreme Court, by a 4 to 2 majority, and substantially on the authority of FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, 315, held that the Court of Appeal should have applied a "rational relationship" test which required it to ignore the facts of the statute's legislative history and to engage in "rational speculation" in search of "plausible reasons" or "reasonably conceivable state[s] of "facts" to explain why a hypothetical legislature might have granted the exemptions. (App. A, pp. 38. The majority then found "at least two 'plausible reasons' that rationally could support each of the exemptions in question." (Id., 28.)

First, the Court majority decided, it would not have been irrational to conclude that the exempted attorneys, "as a general matter," are less likely than other attorneys to represent clients on a full-time basis, thus making it less vital, for con-

sumer protection purposes, that such attorneys engage in continuing education. (Id., p. 28, italics in original.) Second, it would not have been irrational to conclude that the exempted attorneys, by reason of their particular professional roles and experience, "as a general matter," would not need continuing education courses in order to be familiar with recent legal developments or to remain competent attorneys. (Id., pp. 28-29.)

The Court's majority concluded that on such "proper understanding and application of the 'rational relationship' equal protection standard", the exemptions of law professors, retired judges, and state officers and elected officials were "not irrational or arbitrary". (Id., pp. 38-39, fn. 14.)

While apparently agreeing with petitioner's contention that it had "plenary authority" to review its own rule, the California majority distinguished this Court's heightened scrutiny of a court rule in Frazier v. Heebe (1987) 482 U.S. 641, as having been pursuant to the Court's supervisory authority, and concluded that because it had adopted the exemptions "at issue" in deference to the Legislature's "policy judgments" of section 6070, it was "clearly appropriate" to apply the rational relationship standard here. (Id., pp. 23-26, fn. 9.)

The two dissenting Justices analyzed the majority's position, and, in substance, concluded its assumptions had no foundation in fact or experience and were therefore irrational. (Id., pp. 47-43, 61-65.)

b. That suspending petitioner for failure to complete 12 hours of study within the first 12 month period the MCLE program was

in effect, while extending to other members the right to complete 24 hours of study within a 24 month period, and to yet other members the right to complete the full 36 hours of mandatory study within the 36 month period provided by the enabling statute and rule of court, violated petitioner's right to the equal protection of the laws under the 14th Amendment, and, because of his age, was particularly damaging to him. (App. H, pp. 143-144; App. I, pp. 151-152; App. J, Facts ##93-97, pp. 178-179; App. K, p. 192; App. L, p. 194; App. O, p. 202.)

(1) The trial court's disposition of the name/compliance classification issue.

Without specifically referring to the name/compliance classification issue, the trial court found that there was no evidence that petitioner had been denied equal protection. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the name/compliance classification issue.

The Court of Appeal, without discussion, rejected petitioner's contentions based upon the name/compliance period classifications. (App. B, pp. 112-113, fn. 27.)

(3) The California Supreme Court's disposition of the name/compliance classification issue.

The Supreme Court referred to the lower court's disposition of the initial compliance period discrimination issue but, stating that it saw "no reason to disturb" the Court of Appeal's conclusion, did not discuss the issue further. (App. A, pp. 16-17, fn. 6.)

2. Petitioner contended that the suspension of his right to practice his profession for failing to comply with the State Bar's MCLE program, and without first affording him the right to a hearing, violated the Due Process Clause of the 14th Amendment in the following particulars:

a. That his suspension from practice by the State Bar without affording him the opportunity of a hearing, violated procedural due process. (App. H, pp. 143-144; App. I, p. 151; App. J, Facts ##12-17, pp. 156-157; App. K, p. 192; App. L, p. 194; App. M, p. 195; App. O, p. 202-203.)

(1) The trial court's disposition of the procedural due process issue.

Without distinguishing petitioner's procedural and substantive due process claims, the trial court found that there was no evidence that petitioner had been denied due process of law. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the procedural due process issue.

The Court of Appeal ruled that, in view of its determination that the exemptions of judges, state officials, and law school professors violated petitioner's right to the equal protection, his due process challenge was moot. (App. B, p. 113, fn. 27.)

(3) The California Supreme Court's disposition of the procedural due process issue.

The California Supreme Court, recognizing that the Court of Appeal had "declined to address [petitioner's] substantive or due process challenges", concluded that the trial

court had "properly rejected them" because they "clearly lack merit." (App. A., p. 17, fn. 6.) Then, citing citing this Court's opinion in Codd v. Velger (1977) 429 U.S. 624, 627-628) and the Arizona Supreme Court's opinion in Matter of Smith (1997) 189 Ariz. 144, 939 P.2d. 422, 424, the court held that petitioner was not entitled to a due process hearing because he had not claimed that he had complied with MCLE's rules and thus there "were no factual questions to be resolved by a hearing." (App. A, p. 18, fn. 6.)

b. That the State Bar's summary suspension of petitioner's right to practice law for for such a trivial reason as failure to complete 12 hours of study within a 12 month period was excessive punishment intended to terrorize petitioner and other members into compliance and a violation of substantive due process. (App. H, p. 147; App. I, p. 151; App. J, Fact #122, p. 184; App. L, p. 194; App. N, p. 196; App. O, p. 198, 201, 203.)

(1) The trial court's disposition of the substantive due process issues.

Without distinguishing petitioner's procedural and substantive due process contentions and supporting evidence, the trial court simply found that there was no evidence that petitioner had been denied due process of law. (App. D, p. 126.)

(2) The Court of Appeal's disposition of the substantive due process issues.

Without distinguishing petitioner's procedural and substantive due process claims, the Court of Appeal ruled that, in view of its determination that petitioner's equal protection right had been violated, his due process challenge was moot. (App. B, p.

113, fn. 27.)

(3) The California Supreme Court's disposition of the substantive due process issues.

The California Supreme Court held that appellant's substantive due process claim "clearly lack[ed] merit, supporting its conclusion by quoting the 10th Circuit's statement in Verner v. State of Colorado (1983) 716 F.2d 1352, 1353, that a "state can require an attorney to take reasonable steps to maintain a suitable level of competency . . . ." (App. A, p. 17, fn. 6.)

3. Petitioner contended that his right to practice law was a vested fundamental right which enhanced the protections due him under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the 14th Amendment. (App. I, pp. 151-152; App. K, p. 192; App. L, pp. 193-194; App. M, p. 195; App. O, p. 201-202; App. P, p. 204.)

a. The trial court's disposition of the fundamental right issue.

The trial court made no reference to petitioner's claim that his right to practice law was a vested fundamental right.

b. The Court of Appeal's disposition of the fundamental right issue.

The Court of Appeal rejected petitioner's contention that his right to practice law was a fundamental right, as held by this Court in Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288, on the ground that Piper was decided under the Privileges and Immunities Clause. (App. B, 77.) However, the Court of Appeal found that Piper supported of its disposition of

the equal protection issue on the ground that the reasons claimed for the discriminations were not of sufficient "substantiality." (Id., p. 85.)

b. The California Supreme Court's disposition of the fundamental right issue.

The California Supreme Court, without referring to petitioner's citation of Piper, rejected his argument that the practice of law was one of the historical "common occupations" which, once established, is constitutionally protected as a "fundamental" right. The court opined that this principle was inapplicable to the equal protection question because the "line of cases" upon which petitioner relied arose under the due process clause. (App. A, pp. 19-21.) Although the court did not consider this principle in rejecting petitioner's due process claims, it did find Piper relevant to the point that court rules may be reviewed for constitutionally impermissible classifications. (Id., p. 24, fn. 9.)

4. In his first brief to the California Supreme Court, petitioner, citing Alexander v. United States (1993) 509 U.S. 544, 558-559, contended that the sanction of suspension from practice violated the 8th Amendment's proscription of excessive fines and punishments. (App. O, p. 203.)

The California Supreme Court did not respond to or acknowledge the existence of the excessive sanction issue.

5. In her dissenting opinion, Justice Brown raised the issue that the MCLE program's exemptions violated the privileges and immunities clause of the California constitution. In his petition for rehearing, petitioner ad-

vised the court of this Court's decision in Saenz v. Roe, 119 S.Ct. 1519, 1525-1526 (1999) vitalizing the concept of a national citizenship endowed with a body of fundamental rights common to all citizens of the several states.

By denying rehearing, again by a majority of 4 to 2 (App. C, p. 122), the California Supreme Court tacitly rejected this view.

REASONS FOR GRANTING THE WRIT

This petition involves the limits of a state's power to compel its citizens, who are competently pursuing their lawful occupations, to participate in "educational" programs, the contents of which are determined by the state and only marginally, if at all, relate to maintaining professional competency, by summary suspension of their licenses to practice.

As stated by the California Supreme Court, continuing education programs for lawyers have been established in some 40 states of the Union. (App. A, pp. 2-3, fn. 1.) What the California court omitted to note is that none of the programs of the other states have been on such an elaborate scale or so blatantly violative of the guarantees of the Bill of Rights and 14th Amendment of the federal Constitution as the California program. (See N.Y. State Bar Assn., Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1998 (1998).)

Continuing education (CE) programs also are mandated for some 28 of the 38 different businesses and professions regulated by California's Department of Consumer Affairs, ranging from accountants and accupuncturists to pharmacists and physicians to social wor-

kers and veterinarians. (See Bus. & Prof. Code, secs. 101, 166.) The number of occupations coming under the Department's control and the number of continuing education programs grow annually. We presume that all states have similar regulatory agencies, but are not aware of their CE programs, if any.

The regulation of occupational activity under the banner of consumer protection must be seen as the most massive exertion of governmental power over the lives of individual citizens since the institution of compulsory military service. And given the authority of the California Supreme Court as the highest court of the nation's largest and most complex state, the impact of its opinion on the attitudes of the myriad bureaucracies of it and the other states is incalculable. This Court should not dignify this opinion, and its manifestly diminished regard for the most basic of individual liberty interests guaranteed by the federal Constitution by a "certiorari denied" note.

It was not and is not petitioner's intent to question the desirability or need for state regulatory control of the many occupations which impact a state's citizens as consumers--which can mean virtually all areas of human endeavor. However, it was and is petitioner's intent to help assure that the rights of the individual receive a fair measure of the protection afforded by the Constitution from the massive intrusive powers of government.

To this end, petitioner submits that this case is unique, not only because of the degree to which the California State Bar, the California Supreme Court, and the California Legislature have done violence to the 14th Amendment, but also because it

affords the Court opportunity to consider the Privileges and Immunities, Equal Protection, Due Process, and Excessive Fines and Punishments Clauses as a seamless barrier between the massive powers of government and the individual's right to pursue an established occupation.

1. The California Court's Decision Conflicts With Decisions of This Court That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the Privileges and Immunities, Equal Protection, and Due Process Clauses of the 14th Amendment.

Although the California Supreme Court as recently its 1998 opinion in Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788-790, had recognized that under both federal and California law "[i]t is axiomatic that the right of an individual to engage in any of the common occupations of life is among the several fundamental rights protected by the due process and equal protection clauses of the Fourteenth Amendment. (See Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238-239, Meyer v. Nebraska (1923) 262 U.S. 390, 399, Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17, Bixby v. Pierno (1971) 4 Cal.3d 130, 145, fn. 12.)", but refused to accept that petitioner's right to practice law was entitled to such protections.

Thus, in rejecting petitioner's claim that such status called for heightened scrutiny of the equal protection issues, the court, erroneously, distinguished petitioner's "line of cases" as arising under the due process clause (App. A, pp. 19-20), but then ignored those cases when it came to briefly consider, and reject, petitioner's due process

claims. (Id., pp. 17-18, fn. 6.)

In fact, the authorities petitioner cited to establish that the right to pursue a lawful occupation, once the individual had been licensed to do so, was a fundamental right, also arose under the Privileges and Immunities Clause (Supreme Court Court of New Hampshire v. Piper (1984) 470 U.S. 274; The Slaughter-House Cases (1872) 16 Wall. 36), and the Equal Protection Clause. (Nordlinger v. Hahn (1992) 505 U.S. 1; Plyler v. Doe (1981) (1981) 457 U.S. 202; Eisenstadt v. Baird (1971) 405 U.S. 438; Yick Wo v. Hopkins (1885) 118 U.S. 356.)

As this Court has made abundantly clear in Saenz v. Roe (1999) 119 S.Ct. 1519, a right is fundamental because of its nature and historical antecedents as well as its importance to the individual and the nation, and, as such, is a right of national citizenship.

Furthermore, it would not appear reasonable that rights held to be fundamental under the Privileges and Immunities and Due Process Clauses should, some how or other, become less fundamental when considered under the Equal Protection Clause, or that a right possessed by the citizens of all the states may be trammeled by a state because the disaffected individual is a citizen of that state.

The California court's refusal to squarely face petitioner's "fundamental right" position was a particularly pointed rejection of the opinions of this Court inasmuch as the very case the California court placed such emphasis upon to support its strained "rational basis" analysis, FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313 --indeed in the very passage quoted by the

court--expressly recognized that where "a statutory classification . . . infringes fundamental constitutional rights," the highly deferential method of review is not applied. (See App. A, pp. 24-28.)

The rule, as stated by the Court in Plyler v. Doe (1982) 457 U.S. 202, 216-217, and from which it has never retreated (see Central State Univ. v. American Ass'n of University Professors (1999) 119 S.Ct. 1162, 1163), is: "Classifications which 'impinge upon the exercise of a 'fundamental right'" are "presumptively invidious". Where classifications affect the exercise of a fundamental right, the State must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."

Petitioner prays the Court to grant certiorari that this salutary principle may be reaffirmed.

2. The Decisions of Federal Courts of Appeal That the Right to Engage in the Common Occupations of Life, Including the Practice of Law, is a Fundamental Right Protected by the 14th Amendment, Are in Conflict.

A panel of the Ninth Circuit, in Lebbos v. Judges of Super. Ct., Santa Clara County (9th Cir. 1989) 883 F.2d 810, 818, held that held that the right of a licensed attorney to practice her profession is a "liberty or property interest in pursuing 'the common occupations or professions of life'" which are protected under substantive due process.

Another panel of the Ninth Circuit, in Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328 & fn. 2, a pre-licensing case, which the Court of Appeal

found decisive (App. B, p. 77), held that the right to practice law was not a fundamental right. The California Supreme Court ostensibly avoided the conflict by omitting to refer to either 9th Circuit case, and "explained" the "fallacy" in petitioner's reasoning by referring to its own prior opinion in a pre-admission case mirroring Lupert. (App. A, pp. 21-22.)

3. The California Court's "Rational Basis" Test Takes This Court's Statements in FCC v. Beach Communications to Unreasonable Extreme.

In order to sustain its own rule, the California Supreme Court not only had to ignore the many cases ruling that statutes infringing fundamental rights are subject to heightened scrutiny, it also had to extend the range of "rational basis" analysis beyond the limits of reality.

In substance the California court held that where the Legislative history of a statute requesting--not mandating--that the court adopt a rule providing for certain exemptions, and the court has adopted such a rule, adding its own exemptions, and the reasons for the exemptions requested by the legislature are known to the court, and its own reasons for adopting the rule and its exemptions are known to the court--as indeed they must have been--but are not disclosed, extreme deference must be extended to a presumed wisdom of the Legislature to the point that the reviewing court must ignore the known facts and must attribute entirely fictitious purposes to the Legislature to justify the facial discriminations of its own rule against equal protection challenge.

The court's theory was that although it had plenary authority to adopt the rule, or to modify or repeal it, it was obliged, for

the purposes of constitutional review, to defer to presumed wisdom of the Legislature. (App. A, pp. 23-26.) Indeed, the court expressly said that in adopting the exemptions, it had deferred to the Legislature's policy judgments, i.e., it granted the exemptions only because the Legislature had wanted them. (App. A, fn. 9, p. 27.) Which was not entirely correct as the court, on its own initiative, had exempted employees of the federal government even though the Legislature had not. (App. A, pp. 5-7.)

Thus, although it was historically clear --and was so known to the courts, the principals, and amicii--that the State Bar had initially asked the Legislature to adopt an MCLE rule which applied to all members of the State Bar without exception, upon encountering opposition from some legislators who did not want to be burdened personally, and a powerful Senator who demanded exemptions for state employees, the State Bar agreed to accept a rule providing for exemptions, and the floodgates opened.

The California Supreme Court majority found rationality in the three classes of exemptions it chose to consider--law professors, retired judges, and State officers and elected officials--by indulging in two suppositions: (1) that "it would not have been irrational to conclude" that the exempted lawyers were less likely to represent clients on a full-time basis, and, therefore, there was less need to protect their clients by requiring them to be current in the law; and (2) that "it would not be irrational to conclude" that the exempted lawyers, because of their experience, were less likely to need continuing education. (App. A, 28-29.)

Not that such suppositions were true,

not that they had had some basis in fact or reality, not that they were reasonable, not that the court had found it rational, only only that "it would not be irrational" to so conclude.

What then are lower courts to take to be the meaning of "any reasonably conceivable state of facts that could provide a rational basis for the classification"? (FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, emphasis added.) Are there such categories as "unreasonably conceivable" facts and "irrational bases" for discriminatory classifications? And does not the relevance of "plausible reasons" (ibid.) necessarily imply the relevance of "implausible reasons", and "rational speculation" imply the existence of "irrational speculation"? (Id., p. 314.) If the answers to these questions are in the affirmative, as seemingly they must be, then court's must have some discretion to so conclude. The important question, however, is by what objective criteria to the courts conclude one way or the other?

It is one thing to defer to a presumed legislative wisdom where the record, in a complex regulatory scheme containing discriminatory elements, is devoid of any legislatively declared basis for the discrimination, as apparently was the situation in Beach. But where the record shows, as here, that the legislature decided to discriminate on the basis of the naked demands of powerful groups, including its own members, that they be exempted from the burdens of the legislation, it is quite another matter for a reviewing court to close its eyes to reality.

What if the California Legislature had expressly declared, "We find that these law-

yers, because of their eminence, status, and political influence, are exempt." Should the Court countenance such a naked claim of privilege on the authority of Beach and the suppositions of the California Supreme Court?

We submit not, for, as this Court stated in Plyler v. Doe (1982) 457 U.S. 202, fn. 34, p. 217: "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' system that the Fourteenth Amendment was designed to abolish."

Petitioner submits that the California court has taken the "rational basis" test to the point where the key words used in Beach should be closely examined for meaning and consistency. Thus, the plain meaning of "rational" is "having reason or understanding". "Reasonable" means "not extreme or excessive", "possessing sound judgment". "Plausible" means "superficially fair, reasonable", "superficially persuasive", "superficially worthy of belief". "Speculation" means "to meditate on or ponder a subject", "to review something idly or casually and often inconclusively".

Petitioner submits that the courts should resort to such amorphous standards of review only in those cases where the record is silent as to the bases for the legislative classifications, and the classifications are not facially or, as stated by the Court in Beach, invidiously discriminatory. (Id., p. 316.)

In Beach (ibid.) the Court quoted Williamson v. Lee Optical of Okla. Inc. (1955) 348 U.S. 483, 489: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." But the record is clear in this case that the discriminations which petitioner established, i.e., (a)

the exemptions of certain classes of attorneys, and (b) the name/compliance period discriminations, were patently invidious. "Invidious" means "tending to cause discontent, animosity, or envy", or "injurious".

The exemptions of favored lawyers certainly caused discontent by proclaiming that non-exempt attorneys were less competent and ethical than their favored peers, and burdening them by requiring them to expend invaluable time and not inconsiderable sums of money attending Bar approved seminars. The name/compliance period discriminations arbitrarily deprived petitioner and other members similarly disaffected of one and two years less time within which to meet their educational obligations and remain in practice.

The California court's reasoning is all the less satisfactory because it used its powers as the highest constitutional authority of the state to support a scheme whereby the agency over which it has exclusive control proposed a bill to the Legislature, the Legislature expressly deferred to the authority of the Court, the Court then promulgated a patently unconstitutional rule, and now insulates its own rule from its own independent judicial scrutiny on the claim that it must defer to the Legislature and invents entirely fictitious reasons why the Legislature's recommendations must be given extreme deference!

On such a record, petitioner submits that the California court's amorphous suppositions are grossly in excess of Beach's authority.

4. The California Court's Decision Conflicts With Decisions of This Court That the Right

to Pursue a Lawful Occupation, Once Granted by the State, May Not Be Suspended Without a Prior Hearing.

The California court cited this Court's per curiam opinion in Codd v. Velger (1977) 429 U.S. 624, 627-628, to justify its conclusion that petitioner was not entitled to to a due process hearing because he had not claimed that he had complied with MCLE's rules and thus, so the Court gratuitously concluded, there "were no factual questions to be resolved by a hearing." (App. A, p. 18, 18, fn. 6.)

Justice Brennan, not foreseeing the use the California Supreme Court would put to Codd v. Velger, opined in dissenting that the Court's ruling "is likely to be of little practical importance." (Id., p. 629.)

Codd v. Velger rested on the assumption that there were no issues to be resolved other than the issue of the falsity of the the stigmatizing material in his former employer's files, and since Velger had not claimed that the stigmatizing materials were false, there was no need for a hearing.

That Velger does not stand for the use put to it by the California court, is obvious from the Court's discussion in Board of Regents v. Roth (1972) 408 U.S. 564, 569-572, the authority for the Velger hearing.

In Coe v. Armour Fertilizer Works (1914) 237 U.S. 413, 424, the Court stated: "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

As is obvious from the opinions of the two court's below (Apps. A, B), petitioner had a multitude of factual and legal issues, in addition to the constitutional issues, to present which might appropriately have been resolved to a large degree by a pre-suspension hearing, not the least of which was the propriety of the Bar's suspension and notification procedures, which were not supported by any prior rule and could readily have been resolved at the Board of Governor's level. (App. J, Fact #27, p. 160.)

In any case, petitioner clearly had a constitutionally protected right to his license to practice his profession and to have a pre-suspension hearing for the purpose of of raising all legal and factual issues in defense of that license. (Barnard v. Thorstenn (1989) 489 U.S. 546, 553; Spevack v. Klein (1967) 385 U.S. 511, 516.)

The California Supreme Court's application of Codd v. Velger was inappropriate and ought to be rejected by this Court.

5. The Sole Sanction of Suspension From Practice Is Arbitrary and Disproportionate to The Offense.

For a state to deprive one of life, liberty or property for arbitrary or insubstantial reasons, is to deny one substantive due process of law. (Planned Parenthood v. Casey (1992) 505 U.S. 833, 846-851.) Recent cases of this Court suggest that a sanction which is grossly disproportional to the offense may violate the 8th Amendment's proscription of excessive fines and punishments, as well as the Due Process Clause of the 14th Amendment. (Alexander v. United States (1993) 509 U.S. 544, 558-559; United States v. Bajakajian, 118 S.Ct.

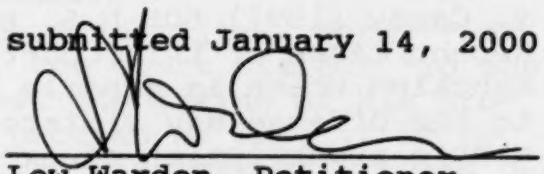
2028, 2036-2038 (1998); BMW of North America v. Gore, 517 U.S. 559, 562, 575 (1996). See Justice Breyer's concern, with the concurrence of Justice O'Connor and Justice Souter, for "arbitrary coercion." Id, p. 587.)

Such peculiar provisions of this MCLE program as providing that the sole sanction for non-compliance is summary suspension from practice, while affording Bar-approved providers full due process hearings before their licenses may be suspended, and the broadcasting of notices of a member's suspension on the same form as notices of disbarments for ethical violations, smack of "arbitrary coercion" and suggest that the State Bar was far more interested in asserting control over its members and coercing them into compliance than it was in continuing education or upholding the Constitution.

CONCLUSION

In his concurring opinion in Schware v. Board of Bar Governors, supra, 353 U.S. 247, Justice Frankfurter noted: "[A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers." How disheartening it is to see the corrosive effect of power and the imperatives of its retention by those who control the largest single association of lawyers in the nation!

Respectfully submitted January 14, 2000.



Lew Warden, Petitioner.

CERTIFICATE OF SERVICE

This is to certify that on January 14, 2000, as provided by Rule 29, par. 3, I deposited three (3) copies of the

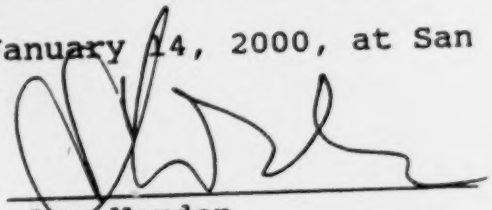
PETITION FOR CERTIORARI
and APPENDICES

herein on counsel for respondents STATE BAR OF CALIFORNIA, LORNA MAYNARD, and CAROLE ROSSI, with the United States Post Office, San Diego, California, postage fully prepaid, in a sealed wrapper, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 2000, at San Diego, California.



Lew Warden
9121 E. Tanque Verde
#105-146
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(2)

Supreme Court, U.S.
FILED

991194 JAN 14 2000

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LEW WARDEN,

Petitioner,

vs

THE STATE BAR OF CALIFORNIA,
LORNA MAYNARD, CAROLE ROSSI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

VOL. I
Appendices A - C, pp. 1-122

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APPENDIX A

OPINION, CALIFORNIA SUPREME COURT

FILED
August 26, 1999
Robert Wandruff, Clerk
Supreme Court of California

IN THE SUPREME COURT OF CALIFORNIA

LEW WARDEN,	)	SO60702
Plaintiff and	)	
Appellant,	)	Ct.App. 1/5
	)	AO72485
v.	)	
	)	
THE STATE BAR OF CALIFORNIA, et al.,	)	Alameda County Super. Ct.
	)	No. 734372-4
Defendants and Respondents.	)	
	)	

In this proceeding, plaintiff Lew Warden, an attorney and member of the State Bar of California (State Bar or Bar), challenges the validity of this state's mandatory (or minimum) continuing legal education (MCLE) program, established pursuant to statute and court rule and administered by the State Bar. Among other claims, plaintiff contends that the current MCLE program violates his right to the equal protection of the laws, because a number of categories of currently licensed attorneys--retired judges, officers and elected officers and elected officials of the State of California, and full-time law professors at

SEE DISSENTING OPINIONS

accredited law schools--are exempt from the MCLE requirements.

The trial court rejected plaintiff's constitutional claims and granted summary judgment in favor of defendants (the State Bar and a number of its employees). On appeal, the Court of Appeal reversed the judgment, concluding that the challenged exemptions from the MCLE program are arbitrary and irrational and thus invalid even under the "rational relationship" equal protection standard that the Court of Appeal found applicable in this setting. Furthermore, the majority opinion in the Court of Appeal, expressing the views of two justices, went on to conclude that the proper remedy for the equal protection violation it had found was the invalidation of the MCLE program in its entirety. The third Court of Appeal justice, while agreeing with the majority that the exemptions were constitutionally flawed, concluded that the appropriate remedy for the equal protection violation was to eliminate only the invalidated exemptions, thereby preserving the MCLE program and extending its requirements to the formerly exempt categories of attorneys as well as to all nonexempt attorneys.

We granted the State Bar's petition for review to consider whether (1) the MCLE program violates federal or state equal protection principles by exempting the specified categories of attorneys from the MCLE requirements, and (2) if so, what the appropriate remedy should be.

As explained hereafter, we conclude that, although the wisdom of some or all of the exemptions may be questioned as a

matter of policy, the challenged exemptions may not be found unconstitutional under a proper understanding of the applicable equal protection standard as established by the governing decisions of both the United States Supreme Court and this court. In light of this determination, there is no need to reach the question of the appropriate remedy were the exemptions to be unconstitutional.

I

The MCLE program in California--a consumer protection measure "intended to enhance the competency of attorneys practicing law in this state" (People v. Ngo (1996) 14 Cal.4th 30, 36)--is a product of legislative action, court rule, and State Bar regulations. [Fn. 1.] In 1989,

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Fn. 1. At the time the California MCLE program was adopted in December 1990, 35 states already had adopted MCLE programs. Since 1990, four more states, in addition to California, have adopted MCLE programs. (See N.Y. State Bar Assn. Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1998 (1998) pp. 4-8 (hereafter Comparison of MCLE Rules as of July 1998); N.Y. Comp. Codes R. & Regs., tit. 22, pt. 1500, Mandatory Continuing Legal Education for Attorneys in New York.) New York is the most recent state to have adopted an MCLE program, effective December 31, 1998. (See Pfau, CLE for New York Attorneys: Ensuring the Tradition of Professionalism

(footnote continued on next page)

the Legislature enacted Business and Professions Code section 6070, which required the State Bar to request this court to adopt a rule of court authorizing the Bar to establish and administer an MCLE program. (Bus. & Prof. Code, sec. 6070), subd. (a). [Fn. 2.] The statute specified a number of details concerning the rule that the State Bar was to request, including the provision that a member of the Bar who failed to satisfy the MCLE requirements would be enrolled as an inactive member and thus be unauthorized to practice law in this state until these requirements were met. (Ibid.)

Section 6070 also includes a separate subdivision--subdivision (c)--that exempts certain categories of attorneys from the reach of the statute, providing that "retired judges, officers and elected officials of the State of California, . . . full-time professors at law schools accredited by the State Bar of California, the American Bar Association, or both [and] . . . [f]ull-time employees of the State of California, acting within the scope of their employment, shall be exempt

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[Fn. 1, cont.]
(Jan. 1999) 71 N.Y.St.B.J. 8.) In most states, MCLE has been established through a rule adopted by the state supreme court. (See Comparison of MCLE Rules as of July 1999, supra, at pp. 4-8.)

Fn. 2. Unless otherwise indicated, all further references are to the Business and Professions Code.

from the provisions of this section." [Fn. 3.]

Following the passage of section 6070, the State Bar requested this court to adopt an MCLE rule. After considering public comment, this court adopted rule 958 of the California Rules of Court, effective December 6, 1990. That rule requires the State Bar to establish and administer an MCLE program, beginning January 1, 1991, "under rules adopted by the Board of Governors of the State Bar." Rule 958, like section

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Fn. 3. Section 6070 provides in full: "(a) The State Bar shall request the California Supreme Court to adopt a rule authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that within designated 36-month periods, all active members of the State Bar shall complete at least 36 hours of legal education activities approved by the State Bar or offered by a State Bar approved provider, with eight of those hours in legal ethics or law practice management, four hours of which shall be legal ethics. If the California Supreme Court adopts a rule authorizing the State bar to establish and administer the program, the State Bar shall establish and administer a mandatory continuing legal education program commencing on or after January 1, 1991. A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to

(footnote continued on next page)

6070, specifies a number of details relating to the MCLE program, and exempts some attorneys from the MCLE requirements. Under rule 958, (1) attorneys exempt under section 6070, (2) full-time federal employees, acting within the scope of their employment, and (3) attorneys "exempt under

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Fn. 3, cont.

"(b) For purposes of this section, statewide associations of public agencies and incorporated, nonprofit professional associations of attorneys, shall be certified as State Bar approved providers upon completion of an appropriate application process to be established by the State Bar. The certification may be revoked only by a majority vote of the board, after notice and hearing, and for good cause shown. Programs provided by the California District Attorneys Association or the California Public Defenders Association, or both, including, but not limited to, programs provided pursuant to Title 1.5 (commencing with Section 11500) of Part 4 of the Penal Code, are deemed to be legal education activities approved by the State Bar or offered by a State Bar approved provider.

"(c) Notwithstanding the provisions of subdivision (a), retired judges, officers and elected officials of the State of California, and full-time professors at law schools accredited by the State Bar of California, the American Bar Association, or both, shall be exempt from the provisions of this section. Full-time employees of the State of California, acting within the scope of their employ-

(footnote continued on next page)

MCLE requirements mandated by the rule. [Fn. 4.]

Contemporaneously with the adoption of California Rules of Court, rule 958, the Board of Governors of the State Bar adopted a set of rules and regulations to govern the operation of the MCLE program. (See State Bar Min. Cont. Legal Ed. Rules and Regulations, secs. 1.0-17.0, adopted by the Bd. of Governors of the State Bar on Dec. 8, 1990, and amended Sept. 1, 1995 (hereafter State Bar MCLE Rules and Regulations).) The regulations set out the five prescribed categories exempted from the MCLE requirements pursuant to section 6070 and rule 958--(1) retired judges, rules adopted by the Board of Governors of the State Bar" are not subject to the

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Fn. 3, cont.
ment, shall be exempt from the provisions of this section. Nothing in this section shall prohibit the State of California, or any political subdivision thereof, from establishing or maintaining its own continuing education requirements for its employees."

Fn. 4. Rule 958 of the California Rules of Court provides in full:

"(a) This rule is adopted under section 6070 of the Business and Professions Code.

"(b) The State Bar shall establish and administer a minimum continuing legal education program, beginning on or after January 1, 1991, under rules adopted by the Board of Governors of the State Bar. These rules may provide for carry[ing]

(footnote continued on next page)

(2) officers and elected officials of the State of California, (3) full-time professors at accredited law schools, (4) full-time employees of the State of California, and (5) full-time federal employees--and provide that the last two categories refer to public employees "who do not practice law in California except as employees of the State of California . . . [or] of the United States Government . . . ." (State Bar MCLE Rules & Regs., sec. 6.1.) In addition, the regulations include a provision--entitled "Good Cause Exemption From or Modification of Requirement"--that authorizes any member of the State Bar to "submit an application

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(Fn. 4, cont.)
forward of excess credit hours, staggering of the educational requirement for implementation purposes, and retroactive credit for legal education approved by the State Bar or offered by a State Bar approved provider completed prior to the effective date of the program.

"(c) Each active member of the State Bar (1) not exempt under Business and Professions Code section 6070, (2) not a full-time employee of the United States Government, its departments, agencies, and public corporations, acting within the scope of his or her employment, and (3) not otherwise exempt under rules adopted by the Board of Governors of the State Bar, shall, within 36-month periods designated by the State Bar, complete at least 36 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Eight of these hours

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setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Continuing Legal Education." State Bar MCLE Rules & Regs., sec. 6.3.) In addition, the regulations include a provision--entitled "Good Cause Exemption From or Modification of Requirement"--that authorizes any member of the State Bar to "submit an application setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Continuing Legal Education. (State Bar MCLE Rules & Regs. sec. 6.3.) [Fn. 5.]

(Fn. 4, cont.)
shall address legal ethics or law practice management. One of the eight hours may, instead, be satisfied by legal education in the civil and criminal remedies available for civil rights violations. However, members shall complete no less than four of the eight hours in legal ethics. Members may be required to complete legal education in other specified areas within the 36-hour requirement under rules rules adopted by the State Bar. Each active member shall report his or her compliance to the State Bar under rules adopted by the Board of Governors of the State Bar.

"(d) A member of the State Bar who

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II

Under the provisions of rule 958, plaintiff, an actively enrolled member of the State Bar, was obligated to comply with the MCLE program. He acknowledges, however, that he did not do so. On April 23, 1993, the Bar, pursuant to its regulations (State Bar MCLE Rules & Regs., sec. 13.2), sent plaintiff a "Non-Compliance Notice," advising plaintiff of what he was required to do to comply with the MCLE requirements and informing him that he had 60 days from the date of the notification to comply with the

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(Fn. 5, cont.)
fails to satisfy the requirements of the State Bar's minimum continuing legal education program shall be enrolled as an inactive member of the State Bar under rules adopted by the Board of Governors of the State Bar.

"(e) The State Bar shall have the authority to set and collect appropriate fees and penalties."

Fn. 5.

Following the State Bar's adoption of the MCLE Rules & Regulations, the State Bar Committee on Minimum Continuing Legal Education adopted a set of Guidelines as "advisory interpretations" of the MCLE Rules and Regulations. (See Guidelines: MCLE Rules and Regulations (MCLE Guidelines).)

The MCLE Guidelines elaborate on a number of the exemptions. Under the guidelines, a retired judge, for purposes of the MCLE exemption, is one who has served

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with the requirements; the notice informed plaintiff that he would be enrolled as an inactive member if he did not submit proof of compliance by June 22, 1993. On June 29, 1993, the Bar sent plaintiff a final notice, advising him that his name would be submitted to the Board of Governors on July 17, 1993, with a recommendation that, effective July 19, 1993, he be enrolled as an inactive member of the Bar until he complied with the MCLE requirements.

On July 9, 1993, plaintiff wrote to the MCLE compliance coordinator of the State Bar, asserting that the MCLE program was unconstitutional and that he should not be prohibited from practicing law for refusing to comply with its requirements. On July 23, a senior administrative assistant of the Bar's legal unit acknowledged receipt of plaintiff's

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(Fn. 5, cont.)
as a judge of a court of record in California or another jurisdiction, has retired from the bench, and is either immediately qualified to receive retirement or pension benefits or is vested in such benefits and is entitled to receive them in the future. (MCLE Guidelines, sec. 6.1.1.) A law professor, for purposes of the MCLE exemption, is a full-time teacher at an accredited law school, regardless of the academic title given by the law school. (Id. sec. 6.1.3.)

With respect to the exemption for attorneys who are full-time state or federal employees, the MCLE Guidelines provide that such attorneys are exempt from

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letter, which had been forwarded by [sic] the Bar's Office of General Counsel for response. On July 30, the Bar sent plaintiff a notice of enrollment on administrative inactive status, informing him that effective July 19, 1993, he was ineligible to practice law in California until the Bar received proof of his compliance with the applicable MCLE requirements.

On September 23, 1993, plaintiff responded to the notice that he had been enrolled as an inactive member by a letter to the State Bar expressing his "profound disagreement" with the MCLE program and threatening to sue the Bar and its employees for damages if it did not "forthwith recall [its] suspension order." On October 7, 1993, plaintiff filed with the State Bar a "Claim of Damage," in which he asserted that as a result of its enrollment of him as an inactive member for noncompliance with the MCLE requirements, the State Bar was liable to him in an amount of $6,000

(Fn. 5, cont.)
the MCLE requirements "only if the sole legal work done by the attorneys is within the scope of their employment. If these attorneys engage in any legal activity outside the scope of their employment, including pro bono work or legal work for the attorney personally, close friends or immediate family, the attorney is not covered by the exemptions . . . and must comply with the full MCLE requirements." (MCLE Guidelines, secs. 6.1.4, 6.1.5, original italics.) More recently, the treatment of pro bono activities by such attorneys has

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per month for lost income and an unspecified amount for "emotional distress." On October 27, the Bar's Assistant General Counsel responded to plaintiff's correspondence in a letter that explained the manner in which the MCLE program had been developed and that indicated that plaintiff's October 7 Claim of Damage had been forwarded to the Board of Governors for review.

After the Board of Governors denied his claim for damages, plaintiff filed the complaint in the present action, naming the State Bar and various employees as defendants, and seeking compensatory and punitive damages, declaratory relief, an injunction, and a writ of mandate. In his complaint, plaintiff maintained that the MCLE program was unconstitutional in numerous respects, asserting that the program had denied him procedural and substan-

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(Fn. 5, cont.)
been modified by the adoption of section 6.1.6 of the State Bar MCLE Rules & Regulations, which provides that "[e]ffective February 1, 1997, members otherwise exempt from the continuing legal education requirements pursuant to sections 6.1.4 and 6.1.5 [i.e., full-time state and federal employees] may provide pro bono legal services through a qualified legal services project or support center . . . provided that the pro bono project or support center ensures that members volunteering pursuant to this section have received the necessary training or otherwise possess the necessary skills to provide quality service and maintain professional standards."

tive due process of law and equal protection of the laws. Among other claims, plaintiff contended that the MCLE program violated his right to equal protection by exempting certain categories of attorneys from its requirements.

The State Bar moved for summary judgment or, in the alternative, for summary adjudication of issues. (Code Civ. Proc., sec. 437c.) After a hearing, the trial court granted summary adjudication in favor of the Bar on all issues submitted by the Bar, thus effectively disposing of all aspects of plaintiff's constitutional challenge. Plaintiff filed a motion for reconsideration, and, after the court filed a formal order granting summary judgment in favor of defendants, plaintiff filed a motion for a new trial. The trial court denied both motions, and plaintiff appealed.

In resolving the appeal, the Court of Appeal focused almost entirely on plaintiff's equal protection claim, and in particular the claim that the MCLE program denied plaintiff equal protection of the laws because the program unjustifiably exempted certain categories of attorneys from the MCLE requirements that applied to plaintiff and all other nonexempt attorneys. After concluding that plaintiff had standing to raise this claim, the Court of Appeal first rejected plaintiffs' contention that his equal protection challenge to the classifications drawn by the MCLE program properly should be evaluated under the "strict judicial scrutiny" test, and instead agreed with the State Bar's position that the ordinary "rational basis" standard of review is applicable in this context. Nonetheless, the Court of Appeal ultimately concluded that whereas the

exemptions for full-time state and federal employees who do not represent individual clients satisfy the rational relationship test, the exemptions for (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time professors at accredited law schools do not. Observing that "[t]he fact that a lawyer wins an election or is appointed to a state office does not mean that the lawyer is necessarily current in recent legal developments, well-versed in legal ethics, or an expert in law office management," and that "[i]f a state officer or elected official, a retired judge, or a law professor represents individual clients in private practice, the same legitimate interests of the public protection of such clients apply," the Court of Appeal concluded that no rational basis exists for these three exemptions.

As noted above, although all three Court of Appeal justices agreed that the three identified exemptions could not be sustained under the "rational relationship" equal protection standard, the justices parted company on the question of the appropriate remedy for the equal protection violation they had identified. Two justices, explaining that they could not find with confidence that the Legislature would have adopted section 6070 without the challenged exemptions, concluded that the appropriate remedy was to invalidate the MCLE program as a whole, leaving the Legislature "to start anew and initiate comprehensive legislative reform of [M]CLE, rather than to accept a judicial reformation of section 6070 manditorily expanding the burden of [M]CLE training to those the Legislature specifically exempted therefrom." The remaining

justice, dissenting from this aspect of the majority opinion, concluded that there was no need to "throw[] the baby out with the proverbial bathwater" and suggested that the better and more appropriate solution was to excise the offending exemptions (which the justice observed apparently applied to only a few hundred attorneys) rather than to invalidate the MCLE program as a whole.

Both plaintiff and the State Bar filed separate petitions for review in this court. We granted only the State Bar's petition for review, which presented two principal issues: (1) whether the Court of Appeal properly found that the exemptions for retired judges, state officers and elected officials, and full-time professors at accredited law schools denied plaintiff the equal protection of the laws, and (2) if so, whether the Court of Appeal correctly concluded that the appropriate remedy is to invalidate the MCLE program as a whole, rather than to extend the MCLE requirements to the previously exempted attorneys. [Fn. 6.]

III

We begin with the question whether the

Fn. 6.

As noted, the Court of Appeal did not find that the exemptions for full-time state or federal attorneys denied plaintiff equal protection of the laws. That court also rejected plaintiff's claims that his rights were violated by the State Bar's reliance upon his last name (whose alphabetical order governed

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state's exemption of (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time professors at accredited law schools from a generally applicable MCLE program denies plaintiff the equal protection of the laws. As we shall explain, we agree with the Court of Appeal that the applicable equal protection standard of review in this context is the "rational relationship," rather than the "strict scrutiny," standard, but we further conclude that the Court of Appeal erred in determining that the exemptions in question can be found unconstitutional under a proper understanding and application of the rational relationship standard.

(Fn. 6, cont.)
the onset of his initial period for MCLE compliance) and by application of the MCLE requirements to a person of his advanced age, rejecting as well his contention that the Bar and its employees may be sued for damages. We denied plaintiff's petition for review, and we see no reason to disturb the Court of Appeal's conclusions on these issues.

Although the Court of Appeal declined to address plaintiff's substantive or procedural due process challenges to the MCLE program, we conclude that these claims clearly lack merit and that the trial court properly rejected them. (See Verner v. State of Colo. (10th Cir. 1983) 716 F.2d 1352, 1353, cert. den. 466 U.S. 490 ["[A] state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a 'rational connection with the [attorney's] fitness or capacity to practice law.' [Citations.] We cannot say that the CLE requirements in Colorado have no rational connec-

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In D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, we described the two principal standards or tests that generally have been applied by the courts of this state and the United States Supreme Court in reviewing classifications that are challenged under the equal protection clause of the Fourteenth Amendment of the United States Constitution or article I, section 7, of the California Constitution. As the court in D'Amico explained: "The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption

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(Fn. 6, cont.)
tion to a lawyer's suitability to practice law."]; Matter of Smith (1997) 189 Ariz. 144 [939 P.2d 422, 424] [upholding Arizona's MCLE requirements.].) Because plaintiff was provided notice of his noncompliance with the existing MCLE requirements, and did not claim that he had complied with, or was exempt from, those requirements, there were no factual questions to be resolved by a hearing, and under such circumstances the State Bar's nondiscretionary ministerial action of placing plaintiff on inactive status without a hearing did not deny him procedural due process. (See, e.g., Matter of Smith, supra, 939 P.2d 422, 424; Codd v. Velger (1977)

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of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it." (11 Cal.3d at pp. 16-17, italics in original.)

The court in D'Amico further explained that "a more stringent test is applied . . . in cases involving 'suspect classifications' or touching on fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' [Citation.]" (11 Cal.3d at p. 17.) [Fn. 7.]

In arguing that heightened "strict scru-

(Fn. 6, cont.)
429 U.S. 624, 627-628; DeGenova v. State Board of Education (1955) 45 Cal.2d 255, 259-263; cf. Coleman v. Department of Personnnel Administration (1991) 52 Cal.3d 1102, 1112-1118; see generally 2 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure (2d ed. 1992) sec. 17.8, pp. 645-646.)

Fn. 7.
Since the 1974 decision in D'Amico, supra, 11 Cal.3d 1, the United States Supreme Court has adopted an "intermediate" standard

tiny," as contrasted with the ordinary "rational relationship" standard of review should be applied in determining whether the exemptions within the MCLE program violate the equal protection guarantee, plaintiff relies primarily on a series of decisions of the United States Supreme Court and this court that describe the right to "engage in any of the common occupations of life" as a "fundamental" right or liberty for the purpose of the due process clauses of the federal and state Constitutions. (E.g., Meyer v. Nebraska (1923) 262 U.S. 390, 399; Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 75; Conway v. State Bar (1989) 47 Cal.3d 1107, 1113.) Plaintiff reasons from these decisions that legislation or court

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(Fn. 7, cont.)
of review that it has applied in cases involving classifications that discriminate on the basis of gender or illegitimacy. (See, e.g., Craig v. Boren (1976) 429 U.S. 190, 197 ["To withstand constitutional challenge . . . classifications by gender must serve important governmental objective and must be substantially related to the achievement of those objectives."]; Clark v. Jeter (1988) 486 U.S. 456, 461 ["Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."]; see generally 3 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, supra, sec. 18.3, pp. 16-19.) In the present proceeding, no party has argued that this intermediate standard of review is applicable, and there is no authority that would support its application in this context.

rules that draw distinctions or create classifications relating to the practice of law impinge upon a "fundamental right" for equal protection purposes and are therefore subject to strict scrutiny.

In Hernandez v. Department of Motor Vehicles (1981) 30 Cal.3d 70, we explained the fallacy in this reasoning in addressing a somewhat related contention. As we noted in Hernandez: "Plaintiff's reliance on this line of procedural due process cases appears to rest upon an assumption that whenever a 'property' or 'liberty' interest is accorded the protections of procedural due process, that interest becomes a 'fundamental constitutional right' so that legislative measures regulating such an interest are necessarily subject to strict scrutiny. This assumption is totally unfounded. Recent decisions have established that the whole panoply of ordinary property rights are generally protected from summary termination or deprivation by procedural due process [citations] but no case has even remotely suggested that the constitutionality of substantive legislative measures regulating or restricting such 'protected property' rights are to be judged under a 'strict scrutiny' standard.'" (30 Cal.3d at p. 81, fn. omitted; see also Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 789.)

In Bib'le v. Committee of Bar Examiners (1980) 26 Cal.3d 548, addressing an equal protection challenge to a State Bar rule that accorded differential treatment to Bar applicants on the basis of whether they attended accredited or unaccredited law schools, we rejected the plaintiff's contention that the challenged classification "must be subject to strict scrutiny and supported by a compelling state interest." (26 Cal.3d at

p. 554.) We explained: "This court has articulated the appropriate test in examining claims of discrimination in occupational and professional licensing. 'The conventional "rational relationship" test is traditionally applied in cases involving occupational licensing . . . .' [Citation.] . . . Accordingly, the rules here under attack have a presumption of constitutionality and require only that the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose. [Citations.]" (Id. at p. 555.)

Plaintiff claims that the holding in Bib'le on this point should not be applied to the classification here at issue, because the classification in Bib'le affected only persons who were not yet members of the Bar, whereas the classifications challenged in the present case apply to individuals who already have been admitted to the Bar. But past authorities make it clear that the rational relationship standard applies to classifications involving those persons who already have obtained professional or occupational licenses, as well as to those applying for such licenses. (See, e.g., Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488-489; Semler v. Dental Examiners (1935) 294 U.S. 608, 610-611; Ramirez v. Oregon State Bar (9th Cir. 1989) 887 F.2d 1089, 1089; Wachs v. Curry (1993) 13 Cal.App.4th 616, 624.) [Fn. 8.]

Fn. 8.

As this court noted in D'Amico, supra, 11 Cal.3d 1, 17, there are some cases involving equal protection challenges to occupational or professional regulations in which more stringent scrutiny has been applied, but those cases "invariably involved a clas-

Thus, we agree with the Court of Appeal that plaintiff's equal protection challenge to the exemptions to the MCLE program properly must be evaluated under the traditional "rational relationship" standard. (See also Verner v. State of Colo. (D. Colo. 1982) 533 F.Supp. 1109, 1118, aff'd. (10th Cir. 1983) 716 F.2d 1352 [applying rational relationship standard in determining validity of exemption from state MCLE program].) [Fn. 9.]

B

As noted, although we agree with the Court of Appeal's conclusion that the rational relationship standard applies here, we disagree with the appellate court's further conclusion that, under this standard, the exemp-

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(Fn. 8, cont.)
sification drawn along lines which rendered it 'suspect' in constitutional terms." (See, e.g., Raffaelli v. Committee of Bar Rxaminers (1972) 7 Cal.3d 288, 291-294 [discrimination based on alienage]; Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, 16-20 [discrimination based on gender]; Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288 [discrimination against nonresident].)

Fn. 9.
Although he did not raise the point below, in this court plaintiff argues that because this court possesses "plenary authority" to regulate the practice of law (see generally In re Attorney Disciple System (1998) 19 Cal. 4th 582, 592-593), we may "strictly scrutinize" the challenged exemptions and invalidate them if the court finds they improperly discriminate

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tions to the MCLE program at issue are unconstitutional. As we shall explain, we believe the determination reached by the Court of Appeal rests upon a misapplication of the rational relationship standard.

As both the United States Supreme Court and this court have explained on many occasions, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there

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(Fn. 9, cont.)
against plaintiff and other California attorneys.

Constitutional guarantees protect an individual from impermissible discrimination by the state, whether the state acts through legislative action or court rule (see, e.g., Ex parte Virginia (1880) 100 U.S. 339, 346-347; Bates v. State of Arizona (1977) 433 U.S. 350; Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274), and plaintiff cites no authority suggesting that the rational relationship equal protection standard does not apply to the determination of the constitutionality of classifications in an MCLE program that are established by a judicial rule, as well as to classifications that are embodied in a legislative enactment. (See Verner v. State of Colo., supra, 533 F.Supp. 1109, 1118 [applying rational relationship standard in evaluating equal protection challenge to MCLE requirements imposed by court rule]; see also

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are 'plausible reasons' for [the classification] 'our inquiry is at an end.'" (FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, quoting U.S. Railroad Retirement Bd. v. Fritz (1980) 449 U.S. 166, 179, italics added; see, e.g., Central State University v. Amer. Assoc. of University Professors (1999) ___ U.S. ___ [119 S.Ct. 1162,

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(Fn. 9, cont.)
Adams v. Commission on Judicial Performance (1994) 8 Cal.4th 630, 658-661 [applying rational basis standard in reviewing equal protection challenge to judicially promulgated rule]; Knight v. Tape, Inc. (3d Cir. 1991) 935 F.2d 617, 627-630 [same].) Although Justice Kennard's dissenting opinion (post, at pp. 3-4) suggests that Frazier v. Heebe (1987) 482 U.S. 641 supports some form of "heightened scrutiny" when an equal protection challenge is to a court rule, in that case the United States Supreme Court decided the matter pursuant to its supervisory authority, rather than on constitutional grounds (see id. at p. 645), and, moreover, the rule at issue in Frazier discriminated against out-of-state attorneys, a classification that traditionally has been viewed as constitutionally suspect. (See Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274.) In any event, as the text of rule 958 itself indicates, the exemptions at issue in this case were adopted in deference to the legislative policy judgments embodied in the Legislature's enactment of section 6070, and thus we believe it is clearly appropriate to apply the traditional rational relationship standard here.

To the extent plaintiff's reference to this court's "plenary authority" constitutes

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1163]; Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 130-132.) Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. (See, e.g., American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, 371; Williamson v. Lee Optical Co., supra, 348 U.S. 483, 489 ["Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to

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(Fn. 9, cont.)
a request that we invoke our inherent quasi-legislative authority to amend or modify the provisions of rule 958, the present proceeding is not the appropriate avenue for pursuing such a request. In the complaint on which this action is based, plaintiff did not simply seek a change in the MCLE program for the future, but rather claimed that the existing requirements are invalid and, as a consequence, that the State Bar lacked authority to place him on inactive status for failing to comply with the existing requirements. The current proceeding thus concerns the validity of the MCLE program that resulted in defendant's placement on inactive status, and not whether, as a matter of policy, the existing exemptions should be retained or modified. In determining the validity of the challenged exemptions under the equal protection clause, we apply the rational relationship standard.

the phase of the problem which seems most acute to the legislative mind."].) As the United States Supreme Court has observed: "Defining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line may have been drawn differently at some points is a matter for legislative, rather than judicial consideration.'" (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315-316.)

In this case, the constitutional question is whether an MCLE program that generally requires attorneys licensed by the state to complete a specified number of continuing educational courses violates the federal or state equal protection clause by exempting retired judges, state officers and elected officials, and full-time professors at accredited law schools from the reach of the continuing education requirement. Although it may be that the wisdom of some or all of these exemptions is debatable as a matter of policy [Fn. 10.),

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Fn. 10.

The American Bar Association's commentary to its Model Rule for Minimum Continuing Legal Education recommends against the adoption of any exemptions to an MCLE program. (ABA Center for Legal Ed., Model Rule for Min. Continuing Legal Ed. (rev. 1996) com. to sec. 5.) Nonetheless, the great majority of the forty states that have adopted an MCLE program have exempted some categories of attorneys from their MCLE requirements. (See generally Comparison of MCLE Rules as of July 1998,

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we conclude that the Court of Appeal erred in finding that these three exemptions fail the traditional rational relationship test that applies in this context, because we do not believe it fairly can be said that there is no "reasonably conceivable state of facts facts that could provide a rational basis for the classification." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313.)

As we shall explain, there are at least two "plausible reasons" that rationally could support each of the exemptions in question. First, it would not have been irrational to conclude that the attorneys in each of the exempted categories, as a general matter, are less likely that other attorneys to represent clients on a full-time basis, thus rendering the need for a continuing education requirement less vital, as a matter of consumer protection, for these attorneys than for other attorneys. Second, it would not have been irrational to conclude that, in view of their

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(Fn. 10, cont.)
supra, at pp. 9-17.)

The most common exemption appears to be for attorneys over a specified age (usually 65 or 70), but several of the categories whose exemption is at issue in this case -- elected officials and legislators, and full-time law professors -- also have been exempted from MCLE requirements in a number of other states. (See Comparison of MCLE Rules as of July 1998, supra, at pp. 9-17 [Delaware (elected officials); Georgia (elected officials); Montana (legislators); North Carolina (full-time law-faculty); Oklahoma (legislators); Texas (full-time law faculty, except ethics requirement);

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particular professional roles and experience, the attorneys in each of the exempt classes (again, as a general matter) are less likely than lawyers in general to need continuing education courses in order to be familiar with recent legal developments or to remain competent practitioners.

Thus, with respect to the category of retired judges, it would not be irrational to conclude that such individuals, as a class, are less likely than other attorneys to represent clients on a full-time basis after their retirement from the bench, both because, after retirement, such judges may be likely to scale back the overall time spent on legal work, and because, when they do engage in professional endeavors, they are more likely to serve as assigned judges, mediators, or arbitrators (or in similar roles) than to represent individual clients. Furthermore, because of the high level of legal skills and qualifications that generally are required to obtain a position as a judge, and because the daily work of a judge involves constant exposure to and analysis of on-going developments in the law, it would not be irrational to conclude that it is less necessary, for the protection of the public, to extend the MCLE requirements to this small category of attorneys than to other attorneys.

Similarly, with respect to the category of officers and elected officials of the

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(Fn. 10, cont.)
Washington (legislators)].) Many states also exempt judges from their MCLE requirements (ibid.), but it is not clear whether this exemption in other states applies to retired judges.

State of California, it would not be irrational to conclude that because of the considerable amount of time required for the performance of their public duties, such individuals, as a class, are less likely than attorneys as a whole to represent clients on a full-time basis, and that when such individuals do represent clients in the limited time available, they are likely to do so in areas in which they have some particular current expertise or familiarity. Furthermore, because the work of legislators and state officers is devoted, in substantial part, to the review of the current state of the law and the consideration of proposals to modify the law, or to the implementation of recent changes in the law, it would not be irrational to conclude that this group of attorneys, as a whole, may be less in need of MCLE courses than other attorneys, in order to remain abreast of recent developments in the law.

Finally, with respect to the category of full-time professors at accredited law schools, it again would not be irrational to conclude that because of the amount of time such professors devote to their teaching and other academic pursuits, this category of attorneys is less likely than attorneys as a whole to represent clients on a full-time basis, and, when they do represent clients, less likely that they will engage in legal work outside their area of particular expertise. Moreover, because of the outstanding academic qualifications generally required to obtain a position as a full-time professor at an accredited law school, because the work of a full-time law professor requires the intensive study, analysis, and teaching of the current state of the law, and because full-time professors at accredited law schools function in an academic setting in which lectures, publications, and frequent faculty

discussions typically encompass recent developments in all areas of the law, here too it would not be irrational to conclude that it is less necessary, for the protection of the public, to extend the MCLE requirements to this category of attorneys than to other attorneys.

We emphasize that in assessing the rationality of each of the exemptions in question, we appropriately must evaluate the classifications as a whole. Although some individuals within each of these classifications may be as much in need of MCLE courses as other attorneys, in view of the wide berth the state traditionally is given when a suspect classification or fundamental right is not at issue, the exemptions in question cannot properly be found to be irrational or arbitrary under the traditional, deferential, rational relationship standard. (See, e.g., Williams v. Kapilow & Sons (1980) 105 Cal. App.3d 156, 162-163.) [Fn. 11.]

In reaching a contrary conclusion, the Court of Appeal relied in part upon language from this court's opinion in Cooper v. Bray (1978) 21 Cal.3d 841, a decision that struck down, on equal protection grounds, a statutory provision that barred a passenger-owner of an automobile from recovering personal injury damages against the driver of the vehicle unless the passenger-owner established that the injury proximately resulted from the intoxication or willful misconduct of the dri-

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Fn. 11.

Because we conclude that the exemptions in question are rationally related to a legitimate, reasonably conceivable public purpose, the classifications challenged here are dis-

ver. In the course of the decision in Cooper, the court stated that, in applying what it referred to as the "'restrained' equal protection standard of review" (21 Cal.3d at p. 847), a court is required "'to conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."'" (Id. at p. 848, quoting Newland v. Board of Governors (1977) 19 Cal.3d 705, 711.)

The Court of Appeal in the present case appears to have interpreted this language from Cooper as calling for a somewhat heightened, rather than a restrained, standard of review. This court, however, explained in Fein v. Permanente Medical Group (1985) 38 Cal.3d 137 (Fein) -- a decision reflecting an equal protection challenge to the validity of a provision of the Medical Injury Compensation Reform Act of 1975 (MICRA) -- that the Cooper formulation has "never been interpreted to mean that we may properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem." (38 Cal.3d at p. 163.) The court in Fein explained that in that case, as well as in the court's earlier MICRA decisions, our court had conducted the "serious and genuine judicial inquiry" referred to in Cooper by (1) finding that "the statutory classifications

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(Fn. 11, cont.)
tinguishable from those in D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, and Hays v. Wood (1979) 25 Cal.3d 772, in which the courts struck down statutory classifications after finding that they bore no rational relationship to a legitimate state interest.

are rationally related to the 'realistically conceivable legislative purpose[s]' (Cooper, supra, 21 Cal.2d at p. 851) of MICRA," and (2) by declining to "invent[] fictitious purposes that could not have been within the contemplation of the Legislature . . . ." (Fein, supra, 38 Cal.3d at p. 163, italics omitted.) [Fn. 12.]

We conclude that the exemptions at issue in the present case, like the classifications at issue in Fein, cannot be found unconstitutional under a proper application of the rational relationship test. The explanations or justifications for the exemptions that we have noted above -- that the attorneys who fall within each category may be less likely than other attorneys to represent a significant number of clients on a full-time basis, or may be less likely than other attorneys to

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Fn. 12.

At the time Cooper, supra, 21 Cal.3d 841, and similar cases (see, e.g., Newland v. Board of Governors, supra, 19 Cal.3d 705, 711; Brown v. Merlo (1973) 8 Cal.3d 855, 865 & fn. 7) were decided by this court, there was some suggestion in the academic literature that the United States Supreme Court might be moving toward the adoption of a so-called "newer equal protection," which would provide a "new bite" for the traditional "rational basis" test (see generally Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972) 86 Harv.L.Rev. 1), and some of the analysis in those opinions may reflect that milieu. Since that time, the United States Supreme Court explicitly has adopted an "intermediate" equal protection standard of review

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need to attend continuing education classes in order to be aware of recent developments in the law or remain competent practitioners -- are "'realistically conceivable legislative purposes,'" rather than "fictitious purposes that could not have been within the the contemplation of the Legislature." (Fein, supra, 38 Cal.3d at p. 163, italics added.) And the exemptions are "rationally related" to the consumer protection purpose of the MCLE program insofar as they identify categories of attorneys who, as compared to other categories of attorneys, may not pose as serious a risk to consumers even if these attorneys are not subject to a continuing legal

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(Fn. 12, cont.)
that is applicable in cases involving classifications that discriminate on the basis of gender or illegitimacy (see, ante, fn. 7, pp. 13-14, but at the same time has reaffirmed the deferential nature of the restrained, "rational relationship" equal protection standard. (See, e.g., FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313-316.) Contrary to the suggestion in Justice Brown's dissenting opinion, this court's decision in Fein makes it clear that, under both the federal and state equal protection clauses, the rational relationship test remains a restrained, deferential standard, albeit one that continues to provide protection against classifications that do not bear a rational relationship to a reasonably conceivable, legitimate purpose. (See also Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal.4th 903, 913-924 [applying same rational relationship standard in evaluating equal protection claims under federal and California Constitutions]; Adams v. Commission on Judicial Performance, supra, 8 Cal.4th 630, 658-661 [same].)

education requirement. As we have explained, "[c]ountless constitutional precedents establish . . . that the equal protection clause does not prohibit [the state] from implementing a reform measure 'one step at a time' [Citation.]" (American Bank & Trust Co. v. Community Hospital, supra, 36 Cal.3d 359, 371.) These authorities teach that the equal protection guarantee neither requires nor authorizes a court to invalidate a consumer protection measure like the MCLE program simply because the program, as adopted, does not go as far as it might have in protecting consumers. (See, e.g., Railway Express v. New York (1949) 336 U.S. 106, 110 ["It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."]; McDonald v. Board of Education Commissioners (1969) 394) U.S. 802, 809 ["[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.""].) [Fn. 13.]

In declining to accept these justifications for the challenged exemptions, the Court of Appeal relied upon the circumstance that there was "no support' in the legisla-

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Fn. 13.

One amicus curiae argues that the three exemptions in question should be found unconstitutional because, unlike the exemption for full-time state and federal employees (see, ante, fn. 5), these exemptions are not lost if the exempt attorneys actually undertake to represent a private client. In view of the substantially greater number and diversity of attorneys included within the categories of

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tive history of section 6070 to indicate that these were the actual explanations of the rational or motivations for the adoption of the exemptions, and that "no member of the Bar or other person involved in the design of the [M] CLE program was willing to declare under penalty of perjury that the exemptions were based upon this theory . . . ." The Court of Appeal suggested, instead, that the legislative history of section 6070 "indicates the exempted groups were added in piecemeal fashion, benefiting certain lawyers who were serving in the Legislature or otherwise, and did not wish to be '"dragged into a classroom."'"

In relying, as a basis for its constitutional ruling, upon the absence of evidence in either the legislative history or in the court record to indicate that the proffered justifications for the exemptions were the actual motivation for the adoption of the exemptions, and upon its view that other, less lofty considerations constituted the actual motivation

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(Fn. 13, cont.)
state and federal attorneys, as compared with those falling within the three exemptions here at issue, we cannot find there is no rational basis for providing a narrower scope for the exemptions accorded to state and federal employees.

In any event, the governing authorities establish that under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect (see, e.g., Dandridge v. Williams (1970) 397 U.S. 471, 485) or because it may be "to some extent both underinclusive and overinclusive." (Vance v. Bradley (1979)

(footnote continued on next page)

for the enactment of such exemptions, the Court of Appeal failed to adhere to several fundamental tenets of the rational relationship standard of review. As the United States Supreme Court has explained: "[T]he absence of '"legislative facts"' explaining the distinction '[o]n the record' [citation] has no significance in rational-basis analysis. [Citations.] In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315, italics added; see also Heller v. Doe (1993) 509 U.S. 312, 320 ["A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."].) Furthermore, the high court has explained that when there is a reasonably conceivable justification for a classification, it is . . . 'constitutionally irrelevant whe-

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(Fn. 13, cont.)
440 U.S. 93, 108.) The circumstance that the scope of the various exemptions of the MCLE program could have been more congruent does not provide a sufficient basis to invalidate them under the rational relationship standard. (See, e.g., New York Transit Authority v. Beazer (1979) 440 U.S. 568, 593 ["Because [the classification] does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts in the classification as it is with respect to the classification as a whole." (Fn. omitted.)].)

ther [the] reasoning in fact underlay the legislative decision'" (U.S. Railroad Retirement Bd. v. Fritz, supra, 449 U.S. 166, 179, quoting Flemming v. Nestor (1960) 363 U.S. 603, 612), or whether the "conceived reason for the challenged distinction actually motivated the legislature." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315.) Thus, in instances in which the rational relationship standard is applicable, a classification that, in fact, is rationally related to a reasonably conceivable legitimate public purpose may not be set aside as denying the equal protection of the laws on the ground that the Legislature or other public policy maker that fashioned the classification may have acted out of what is perceived as self-interest or may have had some other asserted "politically motivated" purpose for supporting the measure. (Accord, County of Los Angeles v. Superior Court (Burroughs) (1975) 13 Cal.3d 721, 727 ["[T]he validity of a legislative act does not depend on the subjective motivations of its draftsmen but rests instead on the objective effect of the legislative terms."].)

Accordingly, we conclude that under a proper understanding and application of the "rational relationship" equal protection standard, the exemptions to the MCLE program here at issue cannot be found unconstitutional. The Court of Appeal erred in reaching a contrary conclusion. [Fn. 14.]

IV

The judgment of the Court of Appeal is reversed, and the matter is remanded to the Court of Appeal with directions to affirm the summary judgment in favor of defendants.

GEORGE, C.J.

WE CONCUR:

MOSK, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.

Fn. 14.

In endorsing the Court of Appeal's determination, Justice Kennard's and Justice Brown's dissenting opinions inappropriately fail to apply the rational relationship test in a deferential manner, and instead effectively treat that test as one that permits a court, when ruling on an equal protection challenge under that standard, to reweigh the policy choices that underlay a legislative or quasi-legislative classification or to reevaluate the efficacy of the legislative measure. Contrary to the implication conveyed by the terminology in Justice Kennard's dissent, our holding on the constitutional issue in this case is based not upon a determination or judgment that retired judges, elected officials, or full-time law professors "deserve exemption" from, or "do not need," the MCLE requirements (see dis. opn. of Kennard, J. at pp. 8, 9, 11), but simply upon a conclusion that the exemptions are not irrational or arbitrary. Thus, although it certainly would be reasonable for a policy-maker to conclude that it is as important to require part-time attorneys to complete continuing education courses as it is to require full-time attorneys to do so, it does not follow that it would be arbitrary or irrational for a policy-maker to determine that it is more important to impose such requirements on full-time attorneys who are likely to represent more clients, and to impose the require-

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DISSENTING OPINION BY KENNARD, J.

I dissent.

Unlike the majority, I agree with the Court of Appeal that as currently structured the State Bar's program of mandatory continuing legal education (MCLE), a program that this court established by court rule, denies California attorneys the equal protection of the law guaranteed by the state and federal Constitutions. The MCLE program denies equal protection by granting complete exemptions from all continuing education requirements, for no rational and legitimate reason, to retired judges, law school professors, and state officers and elected officials. I do not agree with the majority that this court is compelled to decide this equal protection issue -- particularly as it relates to the state Constitution -- by using the traditional rational basis standard. Nor do I agree with the majority that when the MCLE's program's exemptions are tested under that standard, they are justifiable.

STANDARD OF REVIEW

The United States Supreme Court and this court have enunciated three standards of review for deciding constitutional equal protec-

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(Fn. 14, cont.)
ment only on such attorneys. As the United States Supreme Court has made clear, a state need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (McDonald v. Board of Election Commissioners, supra, 394 U.S. 802, 809.)

tion challenges. (See generally Tribe, American Constitutional Law (2d ed. 1988) secs. 16-32, p. 1601 et seq.) For legislation containing a "suspect" classification, such as race, or touching upon a fundamental interest, such as voting, courts have been directed to apply strict scrutiny and to uphold the legislation only if its classification is precisely tailored to further a compelling governmental interest. (Adarand Constructors, Inc. v. Pena (1995) 515 U.S. 200, 227; Plyler v. Doe (1982) 457 U.S. 202, 216-217; Darces v. Woods (1984) 35 Cal.3d 871, 888; Johnson v. Hamilton (1975) 15 Cal.3d 461, 466.) For legislation discriminating on the basis of gender or illegitimacy, courts are to apply intermediate scrutiny and to uphold the legislation only if its classification serves an important governmental objective and is substantially related to the achievement of that objective. (United States v. Virginia (1996) 518 U.S. 515, 533; Craig v. Boren (1976) 429 U.S. 190, 197; In re Marriage of Flaherty (1982) 31 Cal.3d 637, 643, fn. 2.) Finally, when the conditions requiring either strict or intermediate scrutiny are absent, courts are to apply what is commonly called the "rational basis" standard of review, under which challenged legislation is rationally related to a legitimate governmental purpose. (Romer v. Evans (1996) 517 U.S. 620, 631; FCC v. Beach Communications, Inc. (1993) 508 U.S. (1993) 508 U.S. 307, 313; D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 16.)

The majority holds that the proper standard of review for the equal protection challenge in this case is the highly deferential rational basis standard. (Maj. opn. ante, at p. 12.) The majority justifies its selection of this standard by citing decisions holding that this minimal standard is appropriate for equal protection challenges to classifications in professional or occupa-

tional licensing laws. (See, e.g., Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488-489; D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, 17.)

Petitioner has challenged the MCLE requirements under the equal protection provisions of both the state and the federal Constitutions. In construing the California Constitution's equal protection guarantee, this court has not slavishly followed decisions of the federal high court construing the equal protection clause of the Fourteenth Amendment to the federal Constitution. (Compare Butt v. State of California (1992) 4 Cal.4th 668, 686 [education is fundamental right for equal protection purposes under the state Constitution] with San Antonio School District v. Rodriguez (1972) 411 U.S. 1, 37-39 [declining to give education the status of a fundamental right for purposes of federal equal protection].) Because the challenge here is brought under the state as well as the federal Constitution, we are not obligated to follow the many federal decisions that the majority fondly cites. Rather, when this court finds cogent reasons to chart a different course, "[w]e have the power and the duty to give independent meaning and force to the provisions of our state charter." (People v. Cahill (1993) 5 Cal.4th 478, 558 (dis. opn. of Kennard, J.).)

The rational basis standard of review, as traditionally applied, is not appropriate when the equal protection challenge is to a court rule. As this court has explained, traditional rational basis review "manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government." (D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, 16.) This justification for an effete standard of review is absent

when the equal protection challenge is not to a law enacted by a co-equal branch of government but to a court rule. The MCLE requirements that petitioner here challenges were not imposed by a bill passed by the Legislature and signed by the Governor, nor were they imposed by an initiative adopted by the voters. This court imposed the MCLE requirements by adopting rule 958 of the California Rules of Court. The restraint that this court could and usually does exercise when considering equal protection challenges to laws enacted by the Legislature, or by the voters through the initiative process, is unnecessary and unfitting when this court is deciding an equal protection challenge to a court rule. We owe ourselves no particular deference. The United States Supreme Court has itself subjected allegedly discriminatory court rules to a form of heightened scrutiny. (See, e.g., Frazier v. Heebe (1987) 482 U.S. 641.) This court likewise has a particular responsibility to ensure that classifications we impose by court rule do not discriminate arbitrarily.

The majority asserts that traditional rational basis review is appropriate because in adopting the court rule by which the MCLE program came into being this court was merely deferring to "legislative policy judgments embodied in the Legislature's enactment of [Government Code] section 6070." (Maj. opn. ante, at p. 17, fn. 9.) Responsibility for the MCLE program is not so easily shirked. Attorney admissions, education, and discipline are matters over which this court has inherent authority, as this court recently proclaimed in a decision authored by the Chief Justice. (In re Attorney Discipline System (1998) 19 Cal.4th 582, 592-593.) We quoted with approval a law review article's statement that "'In each state it is the supreme court, with or without the legislative approval, that dic-

tates the standards for education, admissions and discipline of attorneys.'" (Id. at p. 593, quoting Martineau, The Supreme Court and State Regulation of the Legal Profession (1980-1981) 8 Hastings Const.L.Q. 199, 202.) In enacting Government Code section 6070, the Legislature implicitly acknowledged this court's primacy in matters relating to attorney qualifications by merely directing the State Bar to request that this court adopt an MCLE program. This court was not required to accede to this request, much less accept all of the Legislature's suggestions about the program's details. In short, MCLE is this court's program, and deference to the Legislature should play no part in our review of its evident shortcomings.

Because the law challenged here is a court rule, not legislation enacted by a co-equal branch, the rational basis test, as traditionally applied, is unnecessarily and inappropriately weak and deferential. Because this court has plenary authority to determine the proper standards of review for equal protection challenges under the state Constitution, this court is not compelled to apply the conventional rational basis test. Instead, this court should conduct a thorough and unbiased inquiry into whether the exemptions are sufficiently related to the legitimate goals of the MCLE program to be enforced without denying practicing attorneys the equal protection of the laws guaranteed by our state Constitution. It is unnecessary to determine the precise standard that should be used, however, because the challenged exemptions are invalid even under the traditional rational basis test that the majority applies here.

APPLYING THE RATIONAL BASIS STANDARD

In applying the rational basis standard

of review, I begin by asking what purpose the MCLE requirements are intended to serve. I agree with the majority that the basic purpose of MCLE is consumer protection. The aim of continuing legal education is to provide continuing assurance to the public that all California attorneys, no matter how many years have passed since their law school graduation and State Bar admission, have the knowledge and the skills to provide their clients with high quality legal services.

To achieve this objective, the MCLE program requires that every three years, as a condition of maintaining their active State Bar membership, attorneys complete thirty-six hours of approved legal education, including at least four hours of legal ethics and an additional four hours of either legal ethics, law practice management, or civil rights remedies. (See Cal. Rules of Court, rule 958(c).) The State Bar, acting under authority conferred by this court (ibid.), has adopted implementing rules and regulations that require, in addition, that "[a]t least one [hour] shall relate to prevention, detection, and treatment of substance abuse and emotional distress, but no more than six [hours] shall relate to emotional distress," and that "[a]t least one [hour] shall relate to the elimination of bias in the legal profession based on any of, but not limited to the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation." (State Bar Min. Cont. Legal Ed. Rules and Regs.,sec. 2.1.)

Although serious questions have been raised about the effectiveness of the MCLE program as currently implemented, I here assume that in general the program is of legitimate value in protecting consumers by re-

ducing the incidence and seriousness of legal malpractice. Instruction in substantive law and legal procedure may reduce attorney mistakes in advising and representing clients. Instruction in legal ethics may prevent attorneys from harming their clients by unwitting ethical violations. Instructions in law office management may reduce mistakes caused by by improper handling of client funds, inadvertent missed filing deadlines, and the like. Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them. Finally, instruction in preventing, detecting, and treating substance abuse and emotional distress may avoid attorney mistakes and malpractice resulting from substance abuse and stress-related problems.

For present purposes, the essential question is not whether MCLE in general benefits consumers of legal services, but how exempting three groups of practicing attorneys from the MCLE requirements may be reconciled with this consumer protection purpose. Before addressing this question directly, I consider the majority's argument that the MCLE exemptions are largely immune from equal protection scrutiny because legislation need not be comprehensive and can address a problem piecemeal or only in those aspects where the need for regulation appears greatest. (Maj. opn. ante, at p. 18.) In Hays v. Wood (1979) 25 Cal.3d 772, 790, this court rejected reliance on the same authorities that the majority now cites "at least insofar as they relate to the application of the equal protection provisions of our state Constitution." We explained that the Legislature may not single out a group for regulation "wholly at its whim" but rather "its decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (Id. at pp. 790-791.) In

other words, there must be "'some rationality in the nature of the class singled out.'" (Id. at p. 791; see also FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 323, fn. 3 (conc. opn. of Stevens, J.) [stating his view that when a law "imposes a burden on one group but leaves unaffected another that is similarly, though not identically, situated, 'the Constitution requires something more than merely a "conceivable" or "plausible" explanation for the unequal treatment.'"].)

The majority proposes two justifications for exempting from all MCLE requirements those practicing attorneys who are retired judges, law professors, or state officers or elected officials. I examine these justifications in turn.

The majority states: "First, it would not have been irrational to conclude that the attorneys in each of the exempted categories, as a general matter, are less likely than other attorneys to represent clients on a full-time basis, thus rendering the need for a continuing education requirement less vital, as a matter of consumer protection, for these classes than for other attorneys." (Maj. opn., ante, at p. 19, italics in original.)

This proposed justification contains within itself an assumption I utterly reject --that an MCLE exemption for attorneys who practice only part time is rationally related to the goal of consumer protection. How is it rationally related? Is it rational to suppose that part-time lawyers are more likely than full-time lawyers to be aware of new laws and regulations? Certainly not. Those practicing a trade or profession only part time are less likely to be aware of new legal developments, and thus more in need of continuing education,

than those who practice full time. Is it rational to suppose that clients of part-time lawyers need less protection from incompetent representation than the clients of full-time lawyers? Certainly not. Clients of part-time lawyers are as vulnerable to the damage caused by legal malpractice, and as deserving of protection, as clients of full-time lawyers. Thus, I do not see how an exemption for part-time lawyers is rationally related to consumer protection. Indeed, I can think of no other licensing law that exempts part-time practitioners from requirements aimed at assuring professional competence. Try to imagine a law that exempts from professional competency requirements those surgeons who operate on only a few patients each year, or those commercial airline pilots who make only a few flights, or those engineers or contractors who build only a few high-rise buildings or freeway overpasses. The very idea is ludicrous.

The majority's other proposed justification may seem more plausible, but only at first glance: "Second, it would not have been irrational to conclude that, in view of their professional roles and experience, the attorneys in each of the exempt classes (again, as a general matter) are less likely than lawyers in general to need continuing education courses in order to be familiar with recent legal developments or to remain competent practitioners." (Maj. opn., ante, at pp. 19-20, italics in original.) To evaluate the rationality of this proposed justification, it is necessary to examine separately the three exempt classes attorneys and why the majority thinks that the attorneys in each class, unlike the common run of working attorneys, do not need to complete any continuing education courses.

Why does the majority think that retired judges who have resumed the practice of law

do not need the continuing education instruction required of other attorneys? In the majority's words, retired judges deserve exemption "because of the high level of legal skills and qualifications that generally are required to obtain a position as a judge, and because the daily work of a judge involves constant exposure to and analysis of on-going developments in the law . . . ." (Maj. opn. ante, at p. 20.) I find this attempted rationalization unpersuasive. The "daily work" of most judges is not sufficient to provide adequate knowledge of significant legal developments. Rather, "[p]articipation in judicial education activities is an official judicial duty." (Cal. Rules of Court, rule 970(a); see also Cal. Standards Jud. Admin. sec. 25 et seq.) The program of judicial education includes publications, classes, and seminars provided by the California Center of Judicial Education and Research (CJER). If judges need a continuing education program to perform competently as judges, why do they not need MCLE to represent clients after retirement? I assume that most judges, because of their daily work and their attendance at CJER programs, are current in their knowledge of legal developments on the day their retirements become effective. But I assume with equal justification that all attorneys are current in their legal knowledge when they first qualify for admission to the State Bar. Thereafter, however, both retired judges and recent admittees [and, indeed, all practicing attorneys) face the same obligation to promptly learn of significant legal developments relevant to the areas of law in which they practice. If recent admittees and "ordinary" working attorneys need MCLE, retired judges who choose to reactivate their State Bar membership and to represent clients have the very same need.

Why does the majority think that state

officers and elected officials do not need the continuing education instruction required of other attorneys? The majority states that "because the work of legislators and state officers is devoted, in substantial part, to the review of the current state of the law and the consideration of proposals to modify the law, or to the implementation of recent changes in the law, it would not be irrational to conclude that this group of attorneys, as a whole, may be less in need of MCLE courses than other attorneys, in order to remain abreast of recent developments in the law." (Maj. opn., ante, at pp. 20-21.)

One may question whether state legislators actually spend the bulk of their time in a scholarly study of pending and enacted legislation, rather than in political campaigning and fundraising, responding to constituent requests and complaints, meetings with lobbyists, and legislative negotiation and dealmaking. In any event, although state legislators presumably are aware of the laws they collectively enact, these state statutes are not the only significant source of law. Federal law, local ordinances, the decisions of state and federal courts, court rules, and administrative rules and regulations are all sources of new law that may affect a client's interest in a particular case. State legislators are no more likely than the average practicing attorney to be aware of legal developments from these sources. The majority's rationalization is even more tenuous as applied to other state officers and elected officials, including the Lieutenant Governor, the Secretary of State, the Controller, the State Treasurer, or the Registrar of Voters. Their offices do not require them to be aware of all new legal developments, but only those developments affecting their official duties.

officers and elected officials are likely to represent clients "in areas in which they have some particular current expertise or familiarity." (Maj. opn., ante, at p. 20.) The majority cites no factual basis for this assertion, and I question whether it is accurate, at least if the majority means that state officers and elected officials are likely to undertake representation in matters related to the performance of their official duties. As any such representation would likely result in a conflict of interest, I think it more likely that state officers and elected officials who choose to practice law on the side will do so only in matters unrelated to their official duties.

Why does the majority think that full-time professors at accredited law schools do not need the continuing education instruction required of other attorneys? The majority states that the exemption is justified "because of the outstanding academic qualifications generally required to obtain a position as a full-time professor at an accredited law school, because the work of a full-time law professor requires the intensive study, analysis, and teaching of the current state of the law, and because full-time professors at accredited law schools function in an academic setting in which lectures, publications, and frequent faculty discussions typically encompass recent developments in all areas of the law . . . ." (Maj. opn., ante, at p. 21.)

I agree that it would be ridiculous to require law school professors to attend classes in subjects they teach because their teaching activities are at least the functional equivalent of attending MCLE classes. But the State Bar's implementing MCLE regulations already allow for this by permitting

any attorney to receive MCLE credit for teaching a law school class. (State Bar Min. Cont. Legal Ed. Rules and Regs., sec. 4.1.5.) The State Bar computes the credits in this way: "Credit hours for teaching a law school class are computed by multiplying the number of credit hours/units granted by the law school by 12. If a portion of a law school class is devoted to a subject set forth in section 2.1 [that is, legal ethics, law office management, civil rights remedies, prevention and treatment of substance abuse and emotional distress, and eliminating bias in the legal profession], credit hours for teaching that subject are computed by multiplying speaking time by one. In no case may the credit hours claimed for teaching a law school class exceed credit hours/units multiplied by 12." (State Bar Min. Cont. Legal. Ed. Rules and Regs, sec. 5.4.1.)

This regulation allows full-time professors at accredited law schools to satisfy all MCLE requirements through their teaching activities. Indeed, teaching a single three-unit course would provide thirty-six hours of MCLE credit, enough to satisfy the MCLE requirement for a three year period, provided only that the course included the required number of hours in the mandatory subject area. If a full-time professor's teaching does not satisfy MCLE requirements because it does not sufficiently cover the mandatory subjects, there is no rational basis to infer that the professor is any more knowledgeable in those subjects, or any less in need of instruction, than the a practicing attorney. In view of the rule providing appropriate credit for teaching law school courses, the complete MCLE exemption for full-time professors at accredited law schools is unnecessary and unjustifiable.

Even applying the conventional rational basis test, I am unable to conclude that the challenged exemptions are rationally related to the MCLE program's legitimate purpose of consumer protection.

REMEDY

For the reasons I have given, the MCLE program as currently structured, with its existing exemptions for retired judges, law professors, and state officers and elected officials, denies other practicing attorneys equal protection of the law. There are two possible remedies for this equal protection violation. If the exemption provisions are severable, those provisions alone may be declared invalid, and the remainder of the court rule and the implementing regulations establishing the MCLE program may be enforced. Alternatively, if the exemption provisions are not severable, the entire MCLE program may be declared invalid and its enforcement enjoined. (See Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 670.)

The Court of Appeal, although unanimously of the view that the MCLE exemptions failed equal protection scrutiny, could not agree on the question of remedy. Two Court of Appeal justices concluded that the exemption provisions were not severable and the entire MCLE program was invalid, while the other justice would have permitted enforcement of the MCLE program without the exemptions.

Were three of my colleagues to agree with me and form a majority, we would have to decide the difficult question of remedy. Because a majority of this court finds no equal protection violation, however, the point is academic and I express no view on it.

CONCLUSION

Equal protection of the law "means simply 'that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" (People ex rel. Younger v. County of El Dorado (1971) 5 Cal.3d 480, 502.) Here, in effect, the majority holds that all attorneys are equal before the law, some attorneys--retired judges, law professors, and state officers and elected officials--are more equal than others. I disagree. If a formal MCLE program, administered and supervised by the State Bar, is necessary and appropriate to assure that the knowledge and skills of practicing attorneys remain current, the MCLE program requirements should be applied uniformly to all attorneys who represent private clients. Because the current court rule arbitrarily exempts certain actively practicing attorneys from the MCLE requirements, I agree with the Court of Appeal that it violates the constitutional equal protection guarantees.

KENNARD, J,.

DISSENTING OPINION BY BROWN, J.

We need look no further than the California Constitution to conclude that California's Mandatory Continuing Legal Education (MCLE) program is unconstitutional because it arbitrarily exempts certain classes of active attorneys from its requirements while imposing those requirements on others.

Article 1, section 7, subdivision (a) of the California Constitution provides: "A person may not be . . . denied equal protection of the laws . . . ." Subdivision (b) of the same section provides: "A citizen or a class of citizens may not be granted privileges or

immunities not granted on the same terms to all other citizens." Finally, article 4, section 16, subdivision (a) provides: "All laws of a general nature have uniform operation." Specifically, the latter two provisions find no counterpart in the federal Constitution, and we have interpreted them as providing greater protection that the federal equal protection clause. Specifically, we have held that the state Constitution requires "'a serious and genuine judicial inquiry into the correspondence between [a legislative] classification and the legislative goals'" (Newland v. Board of Governors (1977) 19 Cal. 3d 705, 711, quoting Dorrough v. Estelle (5th Cir. 1974) 497 F.2d 1007, 1011) and prohibits legislative classifications, such as those at issue here, that are "grossly over-inclusive' or "underinclusive." (Brown v. Merlo (1973) 8 Cal.3d 855, 877 & fn. 17; see also Utah v. Mohi (Utah 1995) 901 P.2d 991, 997) ["Utah's uniform operation of the laws provision establishes different requirements than does the federal Equal Protection Clause."] Nevertheless, the majority does not even bother analyzing the requirements of the California Constitution independently from those of the federal Constitution. The majority should apply California's equal protection standards, in which case it would conclude, as I do, that the exemptions at issue here are unconstitutional. Instead, it simply treats the California standards as if they do not exist.

I

Our state equal protection jurisprudence grew out of a recognition of the inadequacy of federal standards. Like our state cases, the federal cases recognize two primary tiers of review: "rational basis" (see, e.g., FCC v. Beach Communications, Inc. (1993) 508 U.S. 307,

313) and "strict scrutiny" (see, e.g., Shaw v. Hunt (1996) 517 U.S. 899, 907.). But, in practice, "rational basis", as used in the federal cases, means any basis, and "strict scrutiny" is "'strict' in theory [but] fatal in fact." (Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972) 86 Harv. L. Rev. 1, 8 (Evolving Doctrine).) As a result, the outcome in every case turns on how the court chooses to characterize the classification. Suspect classifications, such as those based on race or that impact rights the court deems "fundamental", warrant strict (read "fatal") scrutiny; other classifications warrant rational bases (read "anything goes") review. (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313-316.) As Justice Mosk so aptly put it, "[t]he vice of the binary theory . . . is that it applies either a standard that is virtually always met (the rational relationship test) or one that is almost never satisfied (the strict scrutiny test.) [Citation.] Once the test is selected, the result of its application is foreordained . . . ." (Hays v. Wood (1979) 25 Cal.3d 772, 796 (conc. opn. of Mosk, J.).)

Thirty years ago, Professor Gunther recognized the inadequacy of this approach to equal protection and suggested that the high court might be moving toward "means scrutiny." (Evolving Doctrine, supra, 86 Harv. L. Rev. at p. 24.) Under means scrutiny, courts do not second-guess legislative purposes, unless, of course, those purposes contravene explicit constitutional constraints such as the right to free speech. (Id. at pp. 21-23.) Instead, courts examine the means the legislature chose, in order to insure that those means adequately advance the legislative purpose. (Id. at pp. 21, 46-47.)

Means scrutiny has the advantage of not being a subjective process that turns merely on the personal philosophies or biases of judges. (Evolving Doctrine, supra, 85 Harv. L. Rev. at pp. 42-43.) Rather, whether a law in fact furthers its purpose -- that is, whether it has proved successful over time -- is something litigants can prove or disprove based on objective criteria, and therefore it is the sort of inquiry courts are capable of making. (Id. at p. 24.) Moreover, because means scrutiny merely asks whether a law does what the legislature intended it to do, it does not interfere in the legislative process, but only encourages legislators to do their work carefully so as to avoid unintended results. As Professor Gunther argued in his groundbreaking article, "[m]eans scrutiny can improve the quality of the political process -- without second-guessing the substantive validity of its results -- by encouraging a fuller airing in the political arena of the grounds for legislative action. . . .[Par.] . . . Too often the only assurance that the [legislature] has thought about the issues is the judicial presumption that it has. Means scrutiny would provide greater safeguards that the presumed process corresponds to reality . . . ." (Id. at p. 44.)

The high court adopted Professor Gunther's proposal in a series of cases interpreting the federal takings clause. Specifically, the court held that a regulation effects a taking if it does not "'substantially advance" the 'legitimate state interest' sought to be achieved." (Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 834, fn. 3; see also Dolan v. City of Tigard (1994) 512 U.S. 374, 385; Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1016; Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 485; United States v.

Riverside Bayview Homes, Inc. (1985) 474 U.S. 121, 126; Agins v. Tiburon (1980) 447 U.S. 255, 260.) Obviously, this requirement that the legislative means "substantially advance" legislative purposes is more demanding that rational basis review, which only requires some "rational relationship" between means and ends. (Santa Monica Beach v. Superior Court (1998) 19 Cal.4th 952, 1027-1028 (dis. opn. of Brown, J.).) More important, in Brown v. Merlo and Hays v. Wood, we adopted means scrutiny as the standard of judicial review under the state equal protection provisions.

In Brown v. Merlo, supra, we struck down an automobile guest statute that prohibited an injured automobile guest from recovering for the negligent driving of his host, except in certain narrow circumstances. (8 Cal.3d at pp. 858-859.) We noted that, if the law's purpose was to protect hospitality, it was grossly underinclusive because the law singled out "automobile guests as distinguished from all other guests." (Id. at 859; see also id. at p. 864.) On the other hand, if its purpose was to prevent collusive lawsuits between automobile guests and drivers, the law was grossly overinclusive because the vast majority of automobile guests would not file collusive lawsuits. (Id. at p. 859; see also id. at pp. 874-875.) We said, "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the class may file fraudulent lawsuits." (Id. at p. 875.)

More generally, we noted that an "overinclusive classification scheme . . . does not treat similarly situated individuals in like manner . . . ." (Brown v. Merlo, supra, 8 Cal. 3d at p. 876.) Accordingly, we held that, "[a]lthough the constitutional provisions do

not require absolute precision in the designation of classifications, they do not tolerate classifications which are so grossly overinclusive as to defy notions of fairness or reasonableness." (Id. at p. 877.) We reached the same conclusion with respect to grossly underinclusive classifications (id, at p. 877, fn. 17), and we made clear that we were construing the state Constitution and therefore were not constrained by the possibility that more deferential standards might apply under the federal Constitution. (Id. at p. 865, fn. 7.)

Thus, our holding in Brown v. Merlo instructed courts to scrutinize the means the Legislature chose to advance its purpose. Specifically, we held that if the Legislature relied on grossly overinclusive or underinclusive classifications, then it chose means that are constitutionally inadequate, and courts must strike the law down. And so as to leave absolutely no doubt about this point, we reiterated it seven years later in Hays v. Wood. In that case, we struck down a law that treated public officials who were attorneys or brokers differently from other public officials with respect to income disclosure. (Hays v. Wood, supra, 25 Cal.3d at pp. 778-779.) The Attorney General justified the statute as a protection against self-serving bias on the part of public officials, arguing that attorneys and brokers receive greater profit from their business endeavors than other persons. (Id. at pp. 788-789.) We found this justification inadequate because it was underinclusive. Specifically, we saw no reasonable explanation for "the selection of but two of the several professions having relatively high profit margins for . . . special treatment . . . ." (Id. at p. 789.) We noted that the Attorney General's argument did "no more than to shift the focus of inquiry from one dis-

tinction to another." (Ibid.) In other words, the law might be justified in treating attorneys and brokers differently from business people in general, but it was not justified in treating attorneys and brokers differently from other business people who enjoyed comparably high profit margins." (Id. at pp. 789-790.)

Significantly, we expressly rejected the federal precedents on which the majority relies today, including Williamson v. Lee Optical Co. (1955) 348 U.S. 483, saying "respondents read these cases too broadly -- at least insofar as they relate to the application of the equal protection provisions of our state Constitution." (Hays v. Wood, supra, 25 Cal.3d at p. 790, italics added.) We continued: "Werner v. Southern Cal. etc. Newspapers [(1950) 35 Cal.2d 121], which represents the definitive statement of the subject doctrine in this jurisdiction, makes it lucidly apparent that the legislative body, when it chooses to address a particular area of concern in less than comprehensive fashion by merely 'striking the evil where it is felt most' [citation] may not do so wholly at its whim." (Ibid.) Rather, "its decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (Id. at p. 791.) We held that the ultimate question is "whether there exists a reasonable basis for the legislative body to conclude that the members of [the legislative classification] made up 'the most conspicuous example of the danger it sought to preclude' [citation]." (Id. at p. 792, quoting Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 132.)

Therefore, though the federal Constitution may permit legislatures to take a shotgun approach to problem solving (see Williamson v.

Lee Optical Co., supra, 348 U.S. 483), our state Constitution insists on greater precision, and it does so by requiring courts to scrutinize the means the Legislature chose to advance its purposes. Rather than merely "rubberstamping" the legislative categories at issue here, we should be engaging in "'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals'" (Newland v. Board of Governors, supra, 19 Cal.3d at p. 711), and, more particularly, we should be asking whether the legislative classifications substantially advance the legislative purposes without being "grossly overinclusive" or "underinclusive." (Brown v. Merlo, supra, 8 Cal.3d at p. 877 & fn. 17.)

II

Applying these standards, I have no trouble concluding that the California MCLE program violates the equal protection guaranties of our state Constitution by exempting some active attorneys without exempting others who are "similarly situated with respect to the legitimate purpose of the law." (Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578.)

Rule 958 of the California Rules of Court authorized the State Bar to establish the MCLE program. Pursuant to rule 958, the Board of Governors of the State Bar adopted detailed rules and regulations that govern MCLE. These regulations created five exemptions from the program, three of which are at issue here: (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time law professors at accredited law schools.

The majority hypothesizes two purposes

that it claims justify the exemptions: (1) attorneys in the exempted categories "as a general matter, are less likely . . . to represent clients on a full-time basis . . . ," and (2) these attorneys "(again, as a general matter) are less likely . . . to need continuing education . . . ." (Maj. opn., ante, at pp. 19-20, original italics.) The majority is wrong ab initio under our state Constitution to hypothesize purposes that support the exemptions. In Brown v. Merlo, supra, we rejected "a highly fictional approach to statutory purpose." (8 Cal.3d at p. 865, fn. 7.) We made it clear that, under the state Constitution, "statutory classifications [must] bear some substantial relationship to an actual, not 'constructive,' legislative purpose." (Ibid.) We reaffirmed this principle in Cooper v. Bray (1978) 21 Cal.3d 841, 854, where we said that the purpose under consideration must be one that "can realistically be ascribed to the Legislature." The majority points to nothing in the legislative record indicating that the purposes it hypothesizes are the "actual" or "realistic[]" purposes underlying the exemptions, and, as we shall see, they are in fact, highly unlikely.

Moreover, even if the State Bar actually had in mind the purposes that the majority hypothesizes, the classifications reflected in the exemptions violate the state equal protection guaranties because they are grossly overinclusive and underinclusive and thus do not afford "similarly situated" persons "like treatment." (Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d at p. 578.) First, though it may well be true that retired judges, state officers, and full-time law professors are less likely than other active attorneys to represent clients on a full-time basis, this is only one very small selection

of the active attorneys for whom this description applies, and it is certainly not "'the most conspicuous example.'" (Hays v. Wood, supra, 25 Cal.3d at p. 792, quoting Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal. 2d at p. 132.) If the purpose of the exemptions were truly to exempt attorneys who represent clients on a part-time basis, the rule could easily have included a much broader and more precise exemption that named part-time attorneys expressly. Moreover, as Justice Kennard points out, the hypothetical purpose of exempting part-time attorneys simply makes no sense in light of the more general purpose of consumer protection that underlies the MCLE program: an incompetent part-time attorney is just as dangerous to the consumer as an incompetent full-time attorney. Indeed, the State Bar recognizes this fact by removing the exemption for state employees if they work just one hour outside the scope of their state employment. (State Bar Com. on MCLE, Guidelines: MCLE Rules and Regulations, sec. 6.1.4, eff. Sept. 1, 1995.)

Second, the majority speculates, without any empirical verification, that retired judges, state officers, and full-time law professors are "less likely . . . to need continuing education." (Maj. opn., ante, at p. 21.) While this is a comforting thought, it is a questionable premise. The majority cites "the high level of legal skills and qualifications that generally are required to obtain a position as judge," and it points out that "the daily work of a judge involves constant exposure to and analysis of on-going developments in the law." (Maj. opn, ante, at p. 20.) True. But high qualifications and exposure to on-going developments in the law are only one way in which MCLE serves its consumer-protection purpose. MCLE also requires that attorneys study legal ethics, law practice manage-

ment, and the prevention of substance abuse and emotional distress (Cal. Rules of Court, rule 958(c); State Bar, MCLE Rules and Regs., sec. 2.1), subjects which judges do not usually encounter in the course of their work. Furthermore, even if judges are somehow less in need of continuing education <u>while sitting as judges</u>, the majority does not explain why it is rational to assume they are still less in need after they have returned to private practice. As Justice Kennard points out, the purpose of <u>continuing</u> education is not to insure that lawyers are competent and knowledgeable when they first start their practices, but to ensure that they remain competent and knowledgeable as the years progress.

More important, the classifications are once again overinclusive and underinclusive. Many attorneys who are not retired judges have just as much expertise as retired judges, and at least some retired judges lack the expertise the majority imputes to them. If the purpose of the exemptions were truly to exempt attorneys who are less in need of continuing education, the rule could easily have allowed attorneys to satisfy MCLE requirements by taking a statewide examination.

The same arguments can be made about the relative knowledge and expertise of state officers and full-time law professors. While individuals in these groups may have more legal expertise than attorneys in general, the majority's assertion that, as a group, they have more legal expertise would probably fail to withstand empirical verification, particularly in the areas of legal ethics, law practice management, and the prevention of substance abuse and emotional distress. In any case, these employment categories are, at best, an imperfect basis for assessing legal expertise. And the majority's assertion that

state officers are likely to practice only in areas in which they have expertise is mere speculation and probably true about almost every attorney in the state.

If the purposes of the exemptions are in fact those that the majority has hypothesized, then the State Bar rules achieve those purposes in a ludicrously impractical way, though they could just as easily achieve the same purposes directly and precisely. That approach to legislation is not rational, and we exhibit disrespect for the legislative process when we impute such an irrational approach to our policy makers. Moreover, we undermine the integrity of the political process when we hypothesize such highly unlikely purposes in order to uphold arbitrary and self-serving exemptions.

I dissent.

BROWN, J.

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APPENDIX B

OPINION, CALIFORNIA COURT OF APPEAL

FILED
Court of Appeal-First App. Dist.
Mar 13 1997
RON D. BARROW, CLERK

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

LEW WARDEN,

Plaintiff/Appellant,

v.

THE STATE BAR OF CALIFORNIA, et al.,

Defendant/Respondent.

AO72485

Alameda Superior Court No. 734372-4

Attorney Lew Warden (Warden) appeals from a judgment in favor of the State Bar of California (Bar) and two of its employees rejecting his constitutional challenges to certain aspects of the mandatory continuing legal education (CLE) program (Bus. & Prof. Code, [fn. 1] sec. 6070).

We conclude that we must reverse the trial court's order, which granted judgment against Warden's constitutional challenge to his involuntary enrollment as an inactive Bar member, effectively suspending his license to practice law for failure to comply with the CLE program. We will hold the Bar's CLE program is unconstitutional because it violates the equal pro-

tection rights of members of the Bar who are not exempted from the program. The exemptions from the CLE program allowing currently licensed Bar members who are also officers and elected officials of the state, or retired judges, or certain professors of law, actively to practice law -- while representing clients in private practice without complying with the CLE program -- simply lack any constitutionally required rational basis. The CLE program so constituted violates the equal protection rights of attorneys who are treated less favorably without any rational basis for the less favored treatment. We, therefore, reverse and remand for entry of declaratory relief and an order reinstating appellant's right to practice law.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The CLE Program

In 1989, the Legislature enacted legislation sponsored by the Bar which ultimately provided, "The [Bar] shall request the California Supreme Court to adopt a rule of court authorizing the [Bar] to establish and administer a mandatory [CLE] program" which would require that "within designated 36-month periods, all active members of the [Bar] shall complete at least 36 hours" of approved legal education activities, including four hours of legal ethics and four more of either ethics or law practice management. (Sec. 6070, subd. (a).) If such a rule were adopted, "the

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Fn. 1. Unless otherwise indicated, all subsequent statutory references are to the Business and Professions Code.

[Bar] shall establish and administer" such a program, and any Bar member who failed to satisfy the program's requirements "shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar [Board]." (Ibid.) [Fn. 2.]

Although section 6070, subdivision (a) by its terms applied to "all active members of the [Bar]," [fn. 3.] the statute in its final form also provided a large number of exemptions from the CLE requirements, some of which are in issue here. Section 6070, subdivision (c) specified that "retired judges, officers and elected officials of the State of California," as well as full-time professors at accredited law schools, and full-time state employees acting within the scope of their employment, "shall be exempt" from the section's provisions.

The following year, our Supreme Court, required to conform, inter alia, with the statutory exemption provisions of section 6070, adopted California Rules of Court,

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Fn. 2. Since an inactive Bar member is not allowed to practice law (sec. 6006), involuntary enrollment on inactive status operates as a temporary suspension from the practice of law. (See Conway v. State Bar (1989) 47 Cal.3d 1107, 1111.)

Fn. 3. Persons who are not active members of the bar need not comply. However, many persons who are not on active status may wish voluntarily to participate in such programs. For instance, active California judges, who are not members of the Bar, have their own CLE programs. (See Cal. Standards Jud. Admin., sec. 25.)

rule 958 (rule 958). [Fn. 4.] Rule 958(b) provided that the Bar "shall establish and administer a minimum [CLE] program, beginning on or after January 1, 1991," under rules which "may provide for," among other things, "staggering of the educational requirement for implementation purposes . . . ." Rule 958(c) contained all the exemptions required by section 6070, added an exemption for full-time federal employees acting within the scope of their employment, and required that eight of the thirty-six hours of CLE "shall address legal ethics or law practice management, for hours of which shall be in legal ethics." Furthermore, "Each active member shall report his or her compliance to the [Bar] under rules adopted by [its Board]." (Rule 958(c).) In all other salient respects, rule 958 tracked the mandate of section 6070.

The Bar's Minimum CLE Rules and Regulations (regulations) provide the purpose of the CLE requirement is "to assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices." (Sec. 1.0.) In addition to the ethics and law practice management requirements, the regulations expanded on section 6070 and rule 958 by specifying that in each thirty-six hours of educational activities at least

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Fn. 4. As our Supreme Court has observed, "the membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control . . . ." (State Bar of California v. Superior Court (1929) 207 Cal. 323, 331.)

one "shall relate to prevention, detection, and treatment of substance abuse and emotional distress," and another one hour "shall relate to elimination of bias in the legal profession." (Regs., secs. 2.1, 2.1.2, & 2.1.3.) Compliance is established by a self-reporting procedure. (Id., sec. 12.0.)

The regulations defined exempt state and federal employees as those "who do not practice law in California except" as state or federal employees. (Secs. 6.1.4 & 6.1.4.) Section 6.3 established a good cause exemption from or modification of the requirements. [Fn. 5.] Section 14.2 of the regulations provides that enrollment as an inactive member for failure to comply with the CLE requirements "is administrative in nature and no hearing is required."

The Bar has issued guidelines "as advisory interpretations of the [CLE regulations]" (guidelines) which, inter alia, amplified the definitions of certain categories of attorneys exempted from CLE requirements. [Fn. 6.] (See guidelines, 1st par.)

Fn. 5. "A member may submit an application setting forth good cause for an exemption from compliance with or modification of any of the requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum [CLE]." (Regs., sec. 6.3.) "Should the decision be adverse to the member, the member may appeal such decision pursuant to the provisions of California Rule of Court 952(d)." (Id., sec. 6.3.1.)

Fn. 6. Under the guidelines, a retired

(footnote continued on next page)

B. Warden's Refusal to Comply

Warden, who was then 73 years old, was required as an actively enrolled member of the Bar to comply with the CLE program in accordance with section 6070. On April 23, the Bar sent him a non-compliance 60--day notice (regs., sec. 13.2), warning that he would be enrolled as an inactive member if he did not submit proof of compliance by June 22. On June 29, he was sent a final notice, advising him that on July 17 his name would be submitted to the Board with the recommendation that he be enrolled as an inactive member of the Bar effective July 19, 1993, until he complied with his CLE requirements.

On July 9, 1993, Warden wrote to the CLE compliance coordinator of the Bar contending

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(Fn. 6, cont.)
judge is one who has served as a judge of a court of record in California or other jurisdictions, has retired from the bench, and is either immediately qualified to receive retirement/pension benefits or is vested in such benefits and entitled to receive them in the future. (Sec. 6.1.1.) A full-time professor is a full-time teacher at an accredited law school regardless of academic title. (Id. sec. 6.1.3.) Full-time state and federal employees are exempt only if the sole legal work they do is within the scope of their employment. They are not exempt if they engage in any outside legal activity, including pro bono work or legal work for themselves, close friends, or immediate family. Attorneys employed by the

(footnote continued on next page)

that the CLE program was unconstitutional and that he could not be forbidden from practicing law for refusing to comply. On July 23, a senior administrative assistant of the Bar's Legal Unit acknowledged receipt of Warden's letter, which had been referred to the Bar's Office of General Counsel for response. On July 30, the Bar sent Warden a notice of enrollment on administrative inactive status, advising him that effective July 19, 1993, he was ineligible to practice law until the Bar received proof of CLE compliance.

On September 23, 1993, Warden wrote a letter threatening to sue the Bar for damages if it did not "forthwith recall [its] suspension order." On October 22, Assistant General Counsel Rossi responded to Warden's letters by outlining the manner in which the CLE program, including the noncompliance provisions, had been "developed at the direction of the Legislature and the California Supreme Court." She also indicated that Warden's October 7 "'Claim of Damage'" had been forwarded to the Board for review.

After the Board denied his claim, Warden filed a complaint against the Bar and its employees for compensatory and punitive damages, declaratory relief, injunction, and mandate. Warden alleged, inter alia,

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(Fn. 5, cont.)
Bar are not exempt. (Id., secs. 6.1.4. & 6.1.5.) "For purposes of 6.1.4 and 6.1.5, attorneys are exempt who are required by the [Bar] to maintain 'active' membership status as a result of the duties they are required to perform by virtue of their employment with the State of California or the United States Government." (Ibid.)

that the CLE program, as "created" and as applied, violated his right to equal protection, by exempting certain members of the Bar from its requirements.

The Bar moved for summary judgment or summary adjudication of issues. (Code Civ. Proc., sec. 437c.) After a hearing, the court granted summary adjudication of all seven issues the Bar placed before it, thus disposing of all aspects of Warden's constitutional challenge. Warden filed a motion for reconsideration. (Code Civ. Proc., sec. 1008.) After the court filed its summary judgment order, Warden filed a new trial motion. (Code Civ. Proc., sec. 657.) After hearings, the court denied both of Warden's motions. Warden filed a timely notice of appeal.

II. DISCUSSION

Warden contends the Bar's CLE program and its exemptions violates his equal protection rights. [Fn. 7.] The Bar contends its CLE program and the exemptions thereto may only be reviewed to determine whether they have a rational basis, and the Bar suggests the program and some of its exemptions may have a rational basis. We agree with the Bar regarding the scope of review, and apply only a lenient "rational basis" test. Even

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Fn. 7. Section 1 of the Fourteenth Amendment to the Federal Constitution provides that no state may deprive any person of the "equal protection of the laws." This provision is mirrored in article I, section 7 of the California Constitution, which provides "(a) A person may not be . . . denied equal protection of the laws . . . ."

under that test, however, we find no rational basis sufficient to support the CLE program and its exemptions.

A. Standing

We face an initial question as to standing. The Bar did not contend in either the trial court or in its briefs filed on appeal that Warden lacked standing to challenge the CLE program and its exemptions on equal protection grounds. On our own motion, we requested supplemental briefing on this issue. After reviewing the supplemental briefing by Warden and the Bar, we conclude Warden does have standing to challenge the CLE program and its exemptions on equal protection grounds, because he alleges his own rights to equal protection were violated by the operation of the program and the exemptions from the program for other attorneys, which taken together unfairly discriminated against him without any rational basis for the discrimination.

In the leading case from this district regarding the standing requirement for mounting an equal protection challenge, Burns v. State Compensation Ins. Fund (1968) 265 Cal. App.2d 98, the appellant made an equal protection challenge to certain exemptions contained in state insurance law, which the appellant contended were arbitrary and without a rational basis and, therefore, violated his constitutional rights. Burns stated the standing requirement for such an equal protection challenge as follows: "The first issue to be determined is whether appellant possesses the requisite standing to raise this constitutional issue. Broadly stated, this requirement is one that a party attacking the constitutionality of the statute must show some actual or threatened injury.

Accordingly, it is other stated that where, as here, a statute is alleged to be discriminatory, only a member of a class discriminated against can attack it. However, where the complaining party is injured by the legislation, although not a member of the class discriminated against, he may raise the question. [Citations.]" (Pp. 104-105.)

Appellant has standing to mount an equal protection challenge under this test. He is a member of the class allegedly discriminated against, which is composed of attorneys subject to the program and not possessing any exemption from it. He has also been injured by the CLE program, because it was the basis for the Bar's action abrogating his legal ability to practice law. [Fn. 8.]

The federal Supreme Court has reached the same result regarding the standing of a party to mount an equal protection challenge to the operation of certain exception from the coverage of the social security laws, even though it was contended he lacked standing to challenge the favorable treatment accorded others by the statutory scheme since by law he could not be accorded any more favorable treatment, even if his challenge suc-

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Fn. 8. It is clear that Warden's ability to legally practice his profession is entitled to constitutional protection against arbitrary or unconstitutional governmental abrogation. (See Spevack v. Klein (1967) 385 U.S. 511, 516; Barnard v. Thorstenn (1989) 489 U.S. 546, 553.) If Warden did not have standing to assert the unconstitutionality of the Bar's actions relative to himself, then obviously no one would have standing in any case to allege unconstitutionality.

ceeded. (Heckler v. Mathews (1984) 465 U.S. 728, 737-740.) "In this case, appellee claims a type of personal injury we have long recognized as judicially cognizable." (Id. at p. 738.) The high court also observed that a party was not deprived of standing merely because the outcome of the suit might result in withdrawing the more favorable treatment accorded to others without directly benefiting the party treated less favorably: "To the contrary, we have noted that a court sustaining such [an equal protection] claim faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.' [Citations.] For that reason, we have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." (Id. at pp. 738-739.)

The Bar erroneously relies on our decision in Searle v. City of Berkeley Rent Stabilization Board (1988) 197 Cal.App.3d 1251, 1256. There, we held that purchasers of real property lacked standing to challenge a regulation which applied solely to the sellers of real property, because the purchasers were not in the class allegedly discriminated against, and were not injured by the regulation in question. The opposite is true here, where appellant is plainly within the class allegedly discriminated against and subjected to unequal treatment without any rational basis, and where appellant has plainly suffered injury through operation of the CLE program, which was the basis for suspending appellant's

right to practice law. We conclude that appellant has standing here.

B. Scope of Review

Warden contends that we must review the CLE program under the stringent "strict judicial scrutiny" test. The Bar contends we may review the program only under the more lenient "rational basis" test. We agree with the Bar on this point.

Warden urges a higher standard, the strict scrutiny test, should be applied, because the Bar's CLE program infringed his fundamental right to earn a living by practicing as an attorney. (Cf. Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288 (Piper) [A rule against practice by out-of-state attorneys was invalidated, because it discriminated against nonresidents and thereby infringed fundamental rights to equal treatment regardless of state residency under the privileges and immunities clause.].) However, for general equal protection purposes, in the absence of a suspect classification, there is no fundamental constitutional right to practice law; and a statutory classification on this subject will be upheld if it meets the "rational relationship" test. (Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328 & fn. 2.)

The Bar correctly asserts that when a statutory classification is challenged on equal protection grounds, and the statutory classification is not based, inter alia, upon suspect grounds, such as race, the statute's classification scheme should simply be analyzed to determine whether it bears a rational relationship to a legitimate state purpose. (See Del Monte v. Wilson (1992) 1

Cal.4th 1009, 1014 (Del Monte).)

However, this does not mean the courts may abdicate their responsibility to conduct "'"a serious and genuine judicial inquiry into the correspondence between the [legislative] classification and the legislative goals."'" (Cooper v. Bray (1978) 21 Cal.3d 841, 848 (Cooper), italics added by Cooper court, quoting from Newland v. Board of Governors (1977) 19 Cal.3d 705, 711.) [Fn. 9.] In making this "'serious and genuine judicial inquiry,'" we must determine whether the legislative classifications established by the CLE program are rationally related to the purposes of the program, in protecting the public from lawyers who are active members of the bar, representing individual clients, by furthering their education and training in the law, legal ethics, or law practice management. (Fn. 10.)

Fn. 9. "[T]he test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibition against special legislation and the equal protection clause of the federal Constitution." (County of L.A. v. Southern Cal. Tel. Co. (1948) 32 Cal.2d 378, 389.) We would apply a higher and more stringent level of scrutiny if this case involved regulations based upon a suspect classification, such as race, but Warden does not allege the existence of a suspect classification.

Fn. 10. The CLE program has resulted in a large number of Bar approved "providers" of CLE programs for utilization by the thousands

(footnote continued on next page)

C. The CLE Program And Its Exemptions Are Unconstitutional Violations of Equal Protection

The Bar contends that its CLE program and the exemptions thereto are designed to educate lawyers who represent individual clients in their practices, by keeping them current in legal developments and educating them in legal ethics, law office management, and the special problems of prevention of emotional distress or substance abuse which may arise among those who represent individual clients. Assuming without deciding that these may all be worthy goals bearing a rational relationship to a legitimate state interest (see Verner v. State of Colorado (Verner) (D.Colo. 1982) 533 F.Supp. 1109, 1118, aff'd. (10th Cir. 1983) 716 Fed. 2d 1352, 1353 [The Colorado CLE program with no exemptions for state lawmakers, retired judges, or law professors had a rational basis.]), even under the relatively deferential standard of review we apply, the exemp-

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(Fn. 10, cont.)
of California lawyers who are required to attend private, for-profit courses for CLE credit. The course offerings vary widely. They range from conventional offerings in legal practice areas to classes in such subjects as unusual techniques of "stress reduction" through chanting and meditation (Roth, Dr. Feelgood to the Lawyer's Rescue, San Francisco Daily Journal (Jun. 17, 1996) p. 6, cols. 4-5) or "Sports Nutrition" (Beyond Cholesterol Sports Nutrition & Cardiovascular Health (Inst. For Natural Resources) CLE program Sept.-Nov. 1996). While one might question the public benefit or logic in suspending lawyers from the practice of law who decline

tions implicated here which are granted from participation in the California CLE program have no rational relationship to these legitimate state interests.

Under section 6070, subdivision (c), law yers who actively practice law are exempt from the requirements of the CLE program if they are state officers or elected officials such as legislators, retired judges, full-time professors at law schools, or employees of the state or federal governments who do not represent other clients. While a rational relationship may arguably exist between the goals of the legislation and the exemptions for public employees who do not represent individual clients, we fail to see such a rational relationship in the three exemptions for state officers or elected officials, retired judges, and full-time professors who do actively represent individual clients. All of these exempted persons may represent individual clients in private practice without complying with the CLE requirements; and their exemptions do not become inapplicable (as do the exemptions for state or federal employees acting within the scope of their employment) if they act as lawyers representing individual clients.

(Fn. 10, Cont.)
to be trained in sports nutrition or other subjects which are arguably useless in benefiting those lawyers' clients, we will assume, for purposes of this appeal, that some CLE programs do contribute, inter alia, to assurances that California attorneys remain current regarding the law, legal ethics, and law office management.

We discern no rational basis for these three exemptions. The fact that a lawyer wins an election or is appointed to a state office does not mean that the lawyer is necessarily current in recent legal developments, well versed in legal ethics, or an expert in law office management. If a state officer or elected official, a retired judge, or a law professor represents individual clients in private practice, the same legitimate state interests of the public protection of such clients apply; yet these lawyers, without any ascertainable rational basis, are not required to comply with the CLE requirements which their opponents must fulfill.

Nothing in section 6070 or its legislative history shows any rational basis for this discrimination in favor of elected officials of the state, retired judges, and law professors. The only explanation for the exemption accorded to state legislators as "[e]lected officials," for instance, is an indication that the sponsor of the legislation was required to add an exemption applicable to legislators because of the opposition thereto from legislators who "'didn't want to be dragged into a classroom.'" (Sen. Bill No. 905 (1989-1990 Reg. Sess.) (Bill 905) Off. Local Gov. Affairs, Enrolled Bill Rep. (Sept. 25, 1989) p. 2.) The legislative history also seems to indicate the exemptions for retired judges and law professors were added in response to similar sentiments on the part of retired judges and law professors. Appellant and presumably numerous other attorneys also do not want to be "'dragged into a classroom,'" so this is not a rational basis upon which to distinguish between appellant and the exempted lawyers.

If these CLE program exemptions provided (as do the exemptions for state and federal

workers acting within the scope of their employment) that the exemption is lost whenever an otherwise exempt lawyer represents individual clients in private practice, their validity might arguably withstand the rational basis test of constitutional equal protection. In such a case, the Bar might well assert that the legitimate state interests in protecting members of the public from representation by lawyers who were unfamiliar with current law, legal ethics, or the requirements of law office management would support both the CLE program and its exemptions. However, that is not the case here. The very state interest cited by the Bar in support of the CLE program and its exemptions is violated by these exemptions.

In Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288, 291-301 (Raffaelli), our Supreme Court faced a closely analogous problem, where an equal protection challenge was mounted to a section of the Business & Professions Code, and a rule of court adopted pursuant thereto, which prevented resident aliens from becoming members of the Bar. Our high court invalidated the statute and rule of court as violative of equal protection principles, because they imposed a discriminatory scheme of classification without any rational basis: "We conclude that the challenged classification does not have 'a rational connection with the applicant's fitness or capacity to

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Fn. 11. Although the Raffaelli case also dealt with discrimination based upon alienage, a category subsequently subjected to the strict scrutiny standard of review, the test actually employed by the Raffaelli court as to this issue was obviously the same rational basis test which we must apply here.

practice law.'" (Id. at p. 301.) [Fn. 11.] These requirements violated equal protection by regulating Bar membership without any rational basis, since the discrimination against resident aliens who are not citizens, versus naturalized American citizens, was arbitrary and did not serve the enunciated goals of protecting the public from unethical or absconding attorneys. (Id. at p. 299.) The same is true here. The statutory discrimination in section 6070 and the parallel provisions of rule 958, adopted pursuant to the statute and containing the statutorily-mandated exceptions, do not pass muster on equal protection grounds because they lack a rational basis. (See also Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 239, fn. 5 ["[I]t is sufficient to say that a person cannot be prevented from practicing [law] except for valid reasons."] We are required to eliminate legislation or rules of court which violate equal protection by irrationally discriminating against appelland in depriving him of his right to practice law. (Raffaelli, supra, 7 Cal.3d at p. 301; cf. also People v. Hall (1994) 8 Cal. 4th 950, 963 [The court invalidated a rule of court which improperly limited the sentencing discretion of trial judges.]; California Court Reporters Assn. v. Judicial Council of California (1995) 39 Cal.App.4th 15, 33-34, review den. [A rule of court which eliminated the need for court reporters in transcribing proceedings was invalidated.]

Our Supreme Court faced another analogous problem in D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 22-24. There, the statutory classification under attack on equal protection grounds was an enactment forbidding the licensing of doctors of osteopathy as physicians, regardless of their individual qualifications, allegedly to protect the public,

although in fact the record showed doctors of osteopathy were no threat to the public and had been forbidden to practice medicine for reasons having no rational relationship to a legitimate state interest. Our Supreme Court held the legislative classification invalid on equal protection grounds, and ordered that doctors of osteopathy be considered for licensure as physicians. Thus, the constitutional requirement that state regulation of the profession bear a rational relationship to a legitimate state interest imposes upon the courts the duty of fairly testing whether the state classification scheme is consistent with the asserted state interest, here the need to protect the public.

Likewise instructive is the decision of our Supreme Court in Hays v. Wood (1979) 25 Cal.3d 772, 786-795 (Hays). In Hays, the high court invalidated on equal protection grounds a statute which imposed more onerous requirements on certain attorneys in public life than on public figures from other professions. The high court subjected this classification scheme to the rational basis test and found it invalid: "For reasons to be stated, we fail to discern the requisite rationality in the classification here adopted." (Id. at p. 787.) The high court then rejected the rationale (also urged in part by the Bar in this case) that the discriminatory legislation could be justified on the basis that the Legislature could exempt certain classes as a part of "'striking the evil where it is felt most.'" (Id. at p. 791, quoting from Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 132.) As the Hays court explained, the Legislature's "decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (25 Cal.3d at p. 791.) We discern no such rationality in the decision to "'strike'" out against almost all

California attorneys, while exempting for no rational reason a relatively small number of powerful or politically well-connected lawyers. Just as it would violate equal protection to impose a tax upon all persons, but exempt that relatively small number of persons who served in the Legislature or other important positions, we find no rational basis for the CLE exemptions in issue here.

The decision of the federal Supreme Court in Piper, supra, 470 U.S. at pages 284-288 is also instructive, even though the case was decided under the guarantee of equal treatment embodied in the privileges and immunities clause rather than on equal protection grounds. There, the federal Supreme Court found state rules regulating the practice of law and limiting it to state residents were unconstitutional because they were not supported by reasons with sufficient "'substantiality'" (id. at p. 285) in terms of protection of the public from unethical lawyers. The same is true here, where we consider the CLE program and its exemptions, which without any rational basis would allow, as to certain favored attorneys, the perceived evil which the CLE program seeks to prevent. We also observe that our ruling is fully consistent with the recent holding of our Supreme Court in People v. Ngo (1996) 14 Cal.4th 30. In Ngo, our Supreme Court held that compliance with the CLE program was not necessary in order to achieve professional competence, and observed that there was a "'lack of any statistical evidence clearly demonstrating a direct, positive correlation between [CLE] and attorney competence.'" (P. 37.) Similarly, it seems obvious that no statistical evidence demonstrates a rational basis for concluding a currently licensed lawyer, who is a retired judge from any state, an officer or elected official of this state, or a pro-

fessor of law, is consequently more competent than other lawyers in such matters as legal ethics or law office management. Nor does statistical evidence provide a rational basis to support the proposition that a retired judge of five years or more bench experience (see fn. 14, post) primarily devoted to routine criminal matters, for example, who then commences a private law practice should be exempt from CLE requirements, the purpose of which, inter alia, is to ensure his currency in legal matters, while a lawyer who has been in private practice continually for the same or a longer period must meet those requirements for the same purpose.

The Bar also suggests, despite an absense of support in the legislative history or the proceedings below, that the exemptions to the statute may be justified on the unusual theory that the exempted lawyers lawyers are generally less likely to represent individual private clients than other lawyers who are not exempt. For multiple reasons, we must reject this theory postulating a claimed rational basis to support the exemptions in question.

First, as heretofore noted, this theory finds no support in, and is inconsistent with, the legislative history of the statute. That history indicates the exempted groups were added in piecemeal fashion, benefiting certain lawyers who were serving in the Legislature or otherwise and did not wish to be "'dragged into a classroom.'" (Bill 905, Off. Local Gov. Affairs, Enrolled Bill Rep. (Sept. 25, 1989) p. 2.) The exemptions were not designed to benefit all lawyers who did not represent individual clients, and in fact apply to the exempted lawyers regardless of the number of clients they represent.

Second, this theory is inconsistent with the plain language of section 6070, which applies to all nonexempt lawyers regardless of whether they represent few or many clients. There are numerous lawyers who do not ever represent individual private clients, and yet who are not exempted from the law. Lawyers who are employed by cities and counties, by district attorneys, by school districts, by banks and other corporations, or by universities and colleges, are all covered by the statute, without any exemption. It is clear that the purpose of the exemptions was not simply to exempt those lawyers who do not represent individual private clients, or who represent only a few clients, or only do so infrequently. [Fn. 12.]

Third, the record before us does not support the notion that active members of the bar in the exempted categories represent fewer clients than other lawyers. While there may be some lawyers such as legislators, retired judges, professors, and others who do not actively represent any individual clients, they generally opt for inactive status, and as such are exempted from CLE requirements. The exemptions in question here, however, would exempt certain actively enrolled lawyers, e.g., a prominent civil litigator with numerous clients who also happens to be a legislator, a class action specialist who happens to also be

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Fn. 12. If this were the true purpose of the exemptions in question, they would be limited to persons who do not represent private clients, as are the exemptions for state and federal employees.

a law school professor, [fn. 13] or a senior partner in a law firm who is also a retired judge [fn. 14] would all be exempt. By no stretch of the imagination can the exemptions for these lawyers be rationally justified on the grounds that they do not represent individual clients. [Fn. 15.]

Fn. 13. A law professor's regular teaching duties might well satisfy part of the CLE requirement. However, regular teaching of the law would not satisfy the specific requirements for education in the areas of legal ethics, law office management, or the elimination of bias in the profession, except in the case of a professor who happened to teach all three subjects in a given compliance period. Aside from this, however, a law school professor would be exempt from CLE requirements even though the professor also had a substantial private practice representing clients.

Fn. 14. For example, judges with only five years of service on the bench who meet certain other statutory criteria under the Government code would leave the bench "entitled to receive [benefits] at some time in the future"(guidelines, sec. 6.1.1, subd. 2b.), resume private practice, and yet be exempt from the CLE program forever, simply because they would qualify as "retired judges" by statute (sec. 6070) and regulations promulgated by the Bar (sec. 6.1.1). (See Govt. Code, secs. 75033.5 & 75522, subd. (a).)

Fn. 15. The 1989 Legislature which adopted these exemptions was guided by lawyers. Both the Speaker of the Assembly and the President

(footnote continued on next page)

Moreover, our duty under Cooper, supra, is to conduct a "'serious and genuine judicial inquiry'" (21 Cal.3d at p. 848 -- not merely to accept whatever after-the-fact rationalizations might be proffered by the Bar in arguments in briefs, without support in the legislative history or the record under review. Neither the legislative history of section 6070 nor the record before us supports the Bar's theory; no member of the Bar or other person involved in the design of the CLE program was willing to declare under penalty of perjury that the exemptions were based upon this theory, because plainly they were not.

Thus, section 6070 as implemented by rule 958 violates the equal protection clauses of the Fourteenth Amendment of the federal Constitution and article I, section 7 of the California Constitution.

D. The Proper Remedy

We and our concurring and dissenting colleague agree that the exemptions of section 6070 are unconstitutional as to Warden, and

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(Fn. 15, cont.)
Pro Tem of the Senate were lawyers, and both houses contained numerous lawyers (including at least one law school professor). (Cal. Legis. Handbook (1989) pp. 45-53, 225-234.) The membership of the 1989 Legislature adopting these exemptions also included physicians, dentists, and teachers. (Ibid.) We are aware of no legislators in nonlegal professions who have been exempted from continuing education programs or proficiency testing in their professional fields based solely on holding a state office.

that he is entitled to be reenrolled on the Bar's active list.

Our disagreement centers on the proper relief to be otherwise ordered. The Bar suggests by a footnote in its brief, and our colleague also suggests, that we may judicially rewrite section 6070 by "excising the offending exemptions" (dis. opn., post, at pp. 1-2); i.e., at least those exempting from CLE requirements retired judges, officers and elected officials of this state, and full-time law professors, enrolled by the Bar as "active" attorneys. We cannot agree with this suggestion, for the following reasons:

1. Underlying Principles Implicated in the Judicial Reformation of an Unconstitutional Statute

We all recognize that California courts have in some cases reformed a statute to preserve its constitutionality. The bedrock principles courts must heed before rewriting a statute to preserve its constitutionality are these:

a. Such judicial action is a "comparative drastic alternative, to be invoked sparingly . . . ." (Arp v. Workers' Comp. Appeals Bd. (1977) 19 Cal.3d 395, 407 [The court would not reform a constitutionally infirm statute which denied equal protection to widowers who lacked a widow's statutory presumption of total dependency on a deceased spouse, for purposes of computation of workers' compensation benefits.].)

b. "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 675 (conc. opn. of Werdeger, J.) (Kopp).)

c. The court considering such judicial reform of an unconstitutional statute can only do so when it can reach both of two conclusions with confidence; "(i) [I]t is possible to reform the statute in a manner that closely effectuates policy judgment clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to [judicial invalidation] of the statute." (Kopp, supra, 11 Cal. 4th at p. 670, italics added.)

d. Judicial reformation of statutes in a way which does not closely effectuate articulated legislative policy is inappropriate under these standards. (Kopp, supra, 11 Cal. 4th at p. 654.) Judicial reformation of an unconstitutional statute is improper in any event when inconsistent with the legislative intent or when that intent cannot be ascertained. (Id. at p. 643.)

In applying these standards to the unconstitutional equal protection issue apparent in section 6070, we turn again to facets of its legislative history as a first step in deciding if the conclusions Kopp posits can be confidently reached by excision of the section 6070 exemptions for officers and elected officials of the state, retired judges, and full-time college professors.

2. Legislative History of Section 6070

By way of background, we note that prior to the passage of the legislation adding section 6070 (Stats. 1989, ch. 1425, sec. 2, pp. 6307-6308), Bar members had never been required to participate in CLE. Such legal education was promulgated on a voluntary basis for many years through programs offered by the Continuing Education of the Bar and its affiliated agencies.

The new legislation, as here pertinent, was introduced by Senator Davis on March 6, 1989. (Bill 905, 1 Sen. Final Hist., p. 630.) As originally introduced, it was egalitarian in nature, imposing the burdens of CLE on "all active members of the [Bar]" with no exemptions. (Bill 905 (Mar. 6, 1989) sec. 1.) It mirrored the Colorado program whose validity the Bar mistakenly relies on, since that program contained none of the exemptions added later to the California legislation, as we discuss post. (Verner, supra, 716 F.3d at p. 1353.)

The legislation did not survive long in this unamended form. On March 29, 1989, the matter was set for hearing before the Committee on the Judiciary on May 16; that hearing, however, did not take place. Senator Davis canceled the hearing five days before it was to take place; and rather than proceed with a hearing on the unamended version of Bill 905 with no exemptions, he instead amended the measure at the behest of his colleagues to add exemptions. (1 Sen. Final Hist., p. 630.)

The Senate amendment of June 1, 1989, to Bill 905 exempted "officers, elected officials, and full-time employees of the State of California, or of any political subdivision thereof, acting within the scope of their employment . . . ." (Sec. 1, italics added.)

When Bill 905 arrived in the lower house, the Assembly amended the exemption provision, adding exemptions for retired judges and full-time law professors at accredited law schools; it deleted the exemptions the Senate had provided for full-time employees of state political subdivisions acting within the scope of their employment -- e.g., career district attorneys, city attorneys, and county counsel -- while retaining the exemptions for state emp-

loyees similarly situated. ((Aug. 30, 1989) sec. 1) The Legislature passed Bill 905 with the Assembly amendments intact. (1 Sen. Final Hist., p. 630.)

In sum, the Legislature was presented, in the original Bill 905, with the opportunity to enact CLE without the exemptions we find deny constitutional equal protection to Warden. The Legislature rejected that legislative opportunity, further abandoning it by enacting those very exemptions.

The Bar and our dissenting colleague contend we may nevertheless excise those exemptions to return the CLE program to the status which the Legislature has already considered and declined to adopt. In this regard, the case at bench is inapposite to Welsh v. United States (1970) 398 U.S. 333 (Welsh) and the concurring opinion of Associate Justice Harlan (id. at pp. 344-367), which our Supreme Court in Kopp, supra, recognized as the seminal authority for the judicial power of reformation to preserve constitutionality (11 Cal.4th at pp. 627-629).

Welsh involved a federal statute extending draft exemption to conscientious objectors on religious grounds. Justice Harlan, finding the statute unconstitutionally underinclusive, approved the extension of the statutory conscientious objector benefit to persons who claimed that status on non-religious grounds. He rationalized this statutory reformation because he found Congress's prior "longstanding" tradition of extending draft exemption to conscientious objectors indicated the Congress would prefer extension of the conscientious objector benefit rather than its exclusion. (398 U.S. at pp. 365-366 (conc. opn. of Harlan, J.).)

Section 6070 had no "longstanding" legis-

lative substance or prior tradition to indicate any past legislative preference for any CLE program at all; and most critically, there is no historical basis to any claim that the Legislature would have preferred the extension of the burden of CLE training to classes of lawyers it specifically exempted therefrom, after rejecting the clear opportunity in the original version of Bill 905 to do so.

Nothing exists in the legislative history of section 6070, or any legislative tradition concerning CLE of the Bar, causing us to conclude with confidence that excision of its exemptions from CLE would "closely effectuate[] policy judgment clearly articulated by the enacting body," and that the Legislature would have preferred its rejected original version of the statute sans exemptions to its judicial invalidation. (Kopp, supra, 11 Cal.4th at p. 670.) [Fn. 16.]

3. The Mere Enactment of a Statute Does Not Allow Us to Judicially Reform It

The Legislature's enactment of an unconstitutional statute on a given subject does not per se establish with confidence that the Legislature would prefer judicial

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Fn. 16. Moreover, the statute in question here does not contain any severability clause. Although the absence of such a clause is not necessarily determinative, it is one factor to be considered in deciding whether a portion of the statute could be judicially reformed through severance or excision. (See Legislature v. Eu (1991) 54 Cal.2d 492, 535; City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 275.)

reformation over invalidation to cure the constitutional defect. The excision proposal necessarily assumes we may judicially reform the unconstitutional aspects of section 6070 challenged by Warden, by extending the CLE burdens it imposes to classes of lawyers exempted therefrom by the Legislature, simply because the Legislature legislated on the subject of CLE

The rationale of that position is this: A confident and conclusive presumption arises from the mere fact of section 6070's enactment that the Legislature would have extended the burdens of CLE requirements to classes of lawyers it specifically exempted therefrom, had it foreseen those exemptions would result in an unconstitutional statute; i.e., that in enacting section 6070, the Legislature evinced a desire to establish CLE albeit with certain exemptions; and if section 6070 is declared unconstitutional rather than reformed to extend the burden of CLE to the lawyers the Legislature specifically exempted therefrom, that legislative policy decision to enact CLE will be thwarted.

An identical rationale for reformation of statutes enacted by initiative was rejected by a majority of our Supreme Court in Kopp. In Kopp, certain provisions of Proposition 73, an initiative campaign reform measure involving Government Code sections 85301-85304 limiting the amount and pace of political contributions, had been declared unconstitutional in Service Emp. Intern. v. Fair Political Prac. Comm'n (9th Cir. 1992) 955 F.2d 1312 (cert. den. 505 U.S. 1230). Our Supreme Court first held Service Emp. Intern. did not, on full faith and credit grounds, proscribe its authority to judicially reform the initiative statutes to cure their unconstitutionality. Proceeding to that judicial reform issue, a majority of

the Kopp justices found that such authority should not be exercised because it was not possible to determine with confidence that the electorate would have preferred the reformation proposed by the dissenting justices over invalidation. [Fn. 17.]

The dissenters' rejected position in Kopp was predicated, in part, on the same rationale the dissent posits here: Judicial reformation should be undertaken because the initiative measure showed voters clearly wanted political contribution limits, and without the reformation the dissenters urged, "'invalidating a statute would be far more destructive of the electorate's will.'" (Dis. opn., post, at p. 5.) Kopp, of course, rejected reformation of the law before the court on that basis, even though that case, unlike this one, involved an initiative passed by the "electorate." (11 Cal.4th at pp. 670-671.)

We emphasize again our Supreme Court's observation that "close and careful [judicial] scrutiny" must be exercised in deter-

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Fn. 17. Four justices explicitly indicated agreement with this principle: Then Chief Justice Lucas (Kopp, supra, 11 Cal.4th at p. 670), Justice Mosk, (id. at pp. 674-675), Justice Werdegar (id. at p. 678), and Justice Kennard (id. at p. 679 ["I would so determine were I to reach that question . . . ."]). Moreover, even the three dissenters in Kopp (Justices Baxter, Arabian, and then Justice George) based their plea for reformation upon the greater need for reformation of voter-approved initiatives, a consideration which does not apply in this case. (Pp. 685-686.) mining whether the body enacting unconstitutional legislation would have preferred

"a given reformation construction to invalidation." (Kopp, supra, 11 Cal.4th at p. 661, fn. 58.)

"[C]lose and careful scrutiny" is not generated by the simple assumption that the Legislature, because it legislates, albeit unconstitutionally, on a given subject such as CLE, always thereby also expresses a clearly inconsistent desire for a judicially reformed statute on that subject, rather than invalidation of the legislation. Close and careful scrutiny by the judiciary is not so simple. If it were, courts on that basis would arguably have carte blanche to judicially reform all unconstitutional legislation on any subject legislated upon. Thus, no statute would ever be declared unconstitutional, with a judicial reservation of the opportunity of the Legislature to readdress the subject upon which it enacted an unconstitutional statute.

We must rely instead in this analysis on the applicable teachings of Kopp, on which (as we discuss in the next section) not only a majority, but all the justices seem to have agreed. (See fn. 17, ante.) A statute may not be judicially reformed to preserve its constitutionality unless the court can with confidence conclude: Such reformation closely effectuates policy judgments clearly articulated by the enacting body, and the enacting body would have preferred the reformed construction to invalidation of the statute. Neither of these conjunctive inquiries is affirmatively answered by the simple observation that because the Legislature unconstitutionally acted on a particular subject it must have preferred judicial reformation to revocation.

4. No Authority Supports Reform of

Underinclusive Legislation by Extending Its Burdens Rather Than Its Benefits.

California cases judicially reforming, instead of invalidating, underinclusive statutes violating the equal protection clause have uniformly done so by extending the benefits of such statutes to those excluded therefrom. No such statute has been so reformed by extending the burdens it imposes to persons expressly exempted from those burdens by the Legislature.

We begin this portion of our analysis by restating that the issue here is not solely whether we lack the authority to reform an unconstitutional statute. Rather, the issue is whether the statute may be reformed under the Supreme Court's teachings summarized in Kopp: Can we affirmatively reach the conclusions that the exemption excision proposed by the Bar effectuates a policy judgment of the Legislature clearly articulated, and that the Legislature would have preferred the excised version of the statute to its invalidation? (11 Cal.4th at p. 670.)

This case involves authorization imposing for the first time the burden of CLE training on certain California lawyers as a condition to practicing law. Adoption of the Bar's proposal, to excise the exemptions of classes of attorneys from CLE, plainly would have the effect of extending the burden of CLE to other classes of lawyers that the Legislature specifically declined to so burden when presented with that opportunity.

We recognize that in some equal protection cases, distinguishable from this case, a

court's extension of statutes reflects a judicial effectuation of "broad legislative policy judgments granting benefits to a named class, while declining to respect other policy judgments improperly limiting those benefits to the named class." (Kopp, supra, 11 Cal.4th at p. 652, italics added.) However, section 6070 is a statute that conferred burdens, not benefits, on lawyers, and the excision reform the Bar posits extends only the burden of CLE to exempted classes of lawyers.

We have found no case, and neither the Bar nor our dissenting colleague present one, where an underinclusive statute violating the equal protection clause has been judicially reformed, by excision or otherwise, to extend its burdens to persons the Legislature has expressly exempted therefrom. [Fn. 18.] The reason is obvious in the case a bench. The imposition of legal burdens such as CLE is generally an exclusive function of the Legislature through statutory enactment, not a function of the judiciary. When the Legislature has expressly granted exemptions from the burdens its enactment imposes, neither the Kopp principles applicable to judicial reform of an unconstitutional statute, nor common sense, supports the transparent legal fiction that a diametrically opposed judicial inference thereby exists: that the Legislature nonetheless clearly articulated a contrary policy judgment to impose such burdens on the very classes

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Fn. 18. For examples of cases concerning statutes which cannot be reformed under the Kopp standard, see 11 Cal.4th at pages 653-660.)

it exempted therefrom. [Fn. 19.]

We turn now to review of some of the cases dealing with equal protection and extension of benefits and other cases relied upon by the Bar and the dissent. First, Hays, supra, 25 Cal.3d 772, the only case cited by the Bar in support of its excision theory, was a case wherein the Political Reform Act of 1974 (Gov. Code, sec. 81000 et seq.) had set at $1,000 the threshold for public disclosure of any payment made by clients of attorneys and brokers who were public officials. Public officials in other businesses were required to disclose such names of clients only where payments for professional services reached $10,000. Hays, while upholding the statutory concept of disclosure requirements, reformed the statute to extend to attorneys and brokers the benefit of the higher dis-

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Fn. 19. Our dissenting colleague recognizes that the "discriminatory exemption" in issue here violates equal protection because of the burden it places on those not exempted. (Dis. opn., post, at p. 2.) However, he then reasons that this burden of CLE compliance is really a "'benefit'" to the public (id., post, at p. 3, fn. 3), without explaining, for example, how programs he properly describes as "quaint" would benefit the public which bears the ultimate burden of paying for them through legal fees charged by lawyers required to attend (id, post, at p. 4, fn. 4). This analysis is whole inconsistent with Kopp, supra, 11 Cal.4th at page 670. No case supports the proposition that a legislative burden may be extended in reforming a statute to persons

(footnote continued on next page)

closure level of $10,000 which all other public officials were given. Hays did not extend the burden of compliance with the more onerous legislation of all public officials, and Hays did not support such a theory. Nor do any of the cases cited by our dissenting colleague.

Hayes v. Superior Court (1971) 6 Cal.3d 216, 223-224, on which the dissent relies, is also inapposite. There the court reformed a statute to extend its benefits to out-of-state convicts convicted in California who were previously excluded therefrom. "[A] reviewing court may correct a discriminatory classification by invalidating the invidious exemption and thus extending statutory benefits to those whom the Legislature unconstitutionally excluded." (Id, at p. 224, italics added.)

Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 331, which the dissent cites in passing, did not involve the

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(Fn. 19, cont.)
expressly exempted therefrom because some "benefit" to the public can be found in the overall legislative purpose in enacting the statute. Substantially all legislative enactments are at least theoretically passed for some public benefit. The judicial reformation section 6070 the dissent urges would simply subordinate a legislative directive that persons be free of a statutory burden, to the second guessing of a court that the Legislature's policy was nonetheless to impose that burden on exemptees because of some overall public benefit the Legislature intended in enacting the legislation on CLE with those exemptions.

reformation of a statute; it involved the constitutionality of separate statutes enacted by an initiative measure containing a severability clause, and is inapposite for that reason alone. Further, Santa Barbara was not a case in which a statute was judicially reformed so as to exclude statutory burdens to persons previously specifically exempted therefrom, and lends no support to that theory. (Accord, Welsh, supra, 398 U.S. at pp. 361-367 (conc. opn. of Harlan, J.).) [Fn. 20.]

The public "'benefit'" argument of the dissent for excision simply reiterates, in slightly different form, the proposition we have already rejected, that section 6070 should be reformed simply because CLE legislation was enacted. It too ignores the Kopp court's rejection of an identical contention. and implicitly rejects the Kopp rules stating the criteria of a court must apply when urged to judicially reform an initiative or legislative statute.

Moreover, the language the dissent relies on from Gerken v. Fair Political Practices Com. (1993) 6 Cal.4th 707, 721-722 (conc. opn. of Baxter, J.), decided prior to Kopp, does not support the argument that "excision" (dis. opn., post, at p. 2) should be applied to section 6070 to achieve some portion of the legislative purpose in legislating upon CLE. The initiative measure under

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Fn. 20. In Del Monte, supra, 1 Cal.4th 1009, the court reformed a statute by extending the benefits of a tax exemption to veterans who were excluded therefrom because not California natives or residents upon entry into service. That decision did not extend the burden of taxation to previously exempted veterans.

consideration in Gerken contained a severability clause 96 Cal.4th at p. 714), unlike the legislation in this case. To paraphrase Gerken, severability of a statute depends upon whether the remainder of the statute, post-severance, would have been adopted by the Legislature had it foreseen the statute's partial unconstitutional invalidity. (Pp. 721-722.)

First, this statement does not establish the criteria to be applied by a court in concluding with confidence whether the statute as judicially modified would have been adopted by the Legislature. Kopp does.

Second, Justice Baxter, and his two co-dissenters in Kopp, specifically concurred in that portion of then Chief Justice Lucas's analysis therein of such criteria at part IV of Kopp. (11 Cal.4th at pp. 660-661.) "I concur in all aspects of parts III and IV of the lead opinion." (Id. at p. 685 (dis. opn. of Baxter, J.).) Thus, all the justices in Kopp concurred in its analysis of criteria to be applied before judicially reforming an unconstitutional or statutory measure. [Fn. 21.]

In sum, no judicial speculation is necessary in this case as to whether the Legislature might have preferred, as a policy matter, the extension of any statutory benefit it granted to other persons not included in

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Fn. 21. United States v. Jackson (1968) 390 U.S. 570, 585, also relied on by the dissent, did not expand the burden of the death penalty for kidnapping; it reformed a statute to strike that burden, eliminating it as a punishment for that crime, while leaving the kidnapping statute otherwise intact.

the statute as being entitled thereto. Statutory burdens, not benefits, were imposed by section 6070. When the Legislature refused the opportunity in the first version of Bill 905 to extend the burden of CLE to all actively enrolled lawyers in favor of amendments specifically exempting certain classes of lawyers therefrom, it clearly articulated a policy judgment diametrically opposed to the Bar's excision proposal here which, if adopted, would substantially restore the very CLE pro gram the Legislature rejected.

The dissent's excision argument is not strengthened by the fact that section 6070, as amended to exempt state officers and elected officials and others, passed by a large margin. No cases are cited supporting the theory that legislation which passes by a large mar gin in an unconstitutional form is more likely to be judicially reformed than other legislation. Once legislation is enacted, we are bound to examine it for purposes of all judicial review without regard to the division of votes that led to its legislative passage. This contention also misses the signal fact that it was the amended version of section 6070, including those exemptions here germane, which passed by a large margin. Assuming arguendo the viability of the theory that legislative intent is somehow determined by counting up the legislators' votes for and against the statute under judicial scrutiny, we logically know from the passage of the version containing those exemptions by such a large margin that the legislators favored those exemptions by large margins; and that apparently very few legislators, if any, favored the version of the legislation which the dissent would adopt by judicial reformation. Those facts,

if assumed arguendo to be relevant, would not allow us to conclude with confidence that the dissent's proposed reformed version of the statute would have passed in the Legislature. They compel the opposite conclusion.

At oral argument counsel for the Bar made certain statements regarding the allegedly small number of lawyers who were exempted from the CLE requirements by the legislation. Those statements simply involved counsel's estimates which are not in evidence and are nowhere supported by the appellate record. More importantly, there is no authority for the proposition that a factor to be considered in the judicial reformation of an unconstitutional statute is the alleged paucity of the number of persons to whom its exempted burdens are proposed to be judicially extended. The unconstitutional law in Kopp, supra, also governed only campaign contributions to a relatively small number of elected officials and their opponents, but our high court did not rely on the small number of persons affected as a means to judicially reform the initiative measure imposing the burden of statutory compliance on that small number of people, just as we may not impose the burdens of CLE compliance upon state elected officials and others through judicial reformation here. [Fn. 22.]

Fn. 22. The numbers cited by the dissent also give an incomplete picture of the impact of the exemptions, which as a matter of common sense include many exempted lawyers, by virtue of the various exemptions for offi-

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In sum, we cannot confidently conclude the Legislature clearly articulated a policy judgment that it would have preferred a reformation of the statute which imposes CLE on classes of attorneys it specifically exempted from its burdens, over invalidation and the consequent legislative opportunity to reexamine the subject legislated upon. The judicial reformation of statutes cannot be predicated upon an evidentiary and intellectual void.

A final but related factor posited by Kopp, applicable to the consideration of judicial reform of an unconstitutional statute, is this: Is it "at least as likely that the [Legislature] would prefer to start anew in order to create a comprehensive and coherent [constitutional] scheme, rather than settle for a makeshift and ill-fitting law that might actually hamper future [CLE] reform by creat-

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(Fn. 22, cont.)
cers and elected officials of the state, retired judges, the many lawyers who are state employees, and so on. The Legislature clearly intended to exempt and did exempt all actively enrolled lawyers from CLE training who are retired judges, officers and elected officials of the state, including legislators and their legal staffs; law professors who teach full-time at certain accredited law schools; and all lawyers employed by the state acting within the scope of their employment. No support exists in logic or the record before us for a confident conclusion that these exemptions were merely coincidental, and that the statute would have passed in the form the dissent proposes without those expressly adopted exemptions, because of any overriding legislative policy decision to establish a requirement for CLE training.

ing the illusion that full and complete reform had been achieved"? (11 Cal.4th at p. 670, italics added.)

This query is particularly pertinent here. If we were to follow the Bar's excision proposal, thereby creating the illusion of full and complete reform of a statute thus seemingly impervious to constitutional challenge, a subsequent equal protection challenge may well arise to section 6070 by reason of matter not directly before us in this appeal, but implicated by that proposal, which the Legislature may well wish to address. What is the rational constitutional basis for exempting full-time state lawyers acting within the scope of their employment from CLE, and denying the same exemption to lawyers similarly situated who are employed by other political subdivisions of the state, such as cities and counties? Further, the Legislature may wish to address the question of whether the Bar departs from its charter under section 6070 and rule 958 by granting CLE credit for certain courses it apparently approved under the rubric of prevention or treatment of emotional distress, [fn. 23] which in the words of one commentator in-

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Fn. 23. Section 2.1.2. of the guidelines provides: "'Emotional distress' may include instruction on how to deal with stress. . . . [Par.] . . . [P]revention, detection and treatment of emotional distress may address generic issues of . . . emotional distress in society in general and need not focus solely on problems which attorneys encounter in the legal profession." (Italics added.) Neither section 6070 nor rule 958 provides for CLE credit for inst-

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struct, inter alia, on such pressing legal and educational issues as "finding a new job, chanting your way to a more efficient law practice or dieting for [CLE] credits . . . ." (Kraw, Class Room Capers, San Francisco Daily Journal (Jan. 7, 1997) p. 4, col. 5.) We again note that the stated purpose of CLE is "To assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices." (Regs., sec. 1.0.) [Fn. 24.]

The dissent correctly observes that these questions are not directly before us,

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(Fn. 23, cont.)
ruction in generic issues of societal emotional distress unrelated to the legal profession. That concept seems to have been added by the Bar on its sole initiative, without any express basis therefor in either legislation or rule of court.

Fn. 24. By contrast, a continuing education program for physicians was established for the protection of the public, which has no exemptions for members of the Legislature, state or federal employees, retired physicians who still practice medicine, or medical school professors. (Secs. 2190 & 2190.1.) This program also carefully sets forth the requirements for approval of education programs, and specifies that course content must be directly related to patient care. (Sec. 2190.1; Cal. Code Regs. tit. 16, sec. 1337.5) All the requirements of that program, as opposed to the one in issue here, have a rational basis in the need to protect the public by keeping active practitioners current in their discipline.

but errs in concluding that their consideration on the issue of judicial reformation of section 6070 is, therefore, impermissible. Kopp posits an analysis of such factors as an important part of the calculus on which such judicial reformation is grounded. A single example illustrates the wisdom of such analysis: A strong possibility exists that an equal protection challenge similar to Warden's will be mounted on behalf of full-time attorneys employed by political subdivisions of the state denied exemption from CLE (for which their public employers may pay) [fn. 25] which is afforded their state counterparts.

To excise the exemptions as the Bar and dissent urge, and thus bypass legislative reconsideration of a statute we have held is unconstitutional, would encourage courts to further reform section 6070 on a piecemeal basis, triggered by successive lawsuits asserting the violation of equal protection to such other lawyers not exempted from CLE requirements. By such means, the court would simply and impermissibly become deeply enmeshed in a role which in the circumstances

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Fn. 25. Bill 905, which enacted 6070, also included a legislative declaration stating it was was "the intent of the Legislature" that local governments should pay the costs of CLE courses for their lawyer employees. (Stats. 1989, ch. 1425, sec. 3, p. 6308.) Thus, local governmental entities not exempted by section 6070, which in obedience to the Legislature's expressed intent paid for CLE compliance courses for their employees, could also have standing to challenge the law. (Cf. County of Ventura v. State Bar (1995) 35 Cal.App.4th 1055, 1057-1060.)

of this case is reserved to the Legislature. We owe deference to that role.

In sum, we recognize that the enactment of a constitutional and beneficial CLE program is, in the first instance, a legislative and not a judicial function. We are here required, however, by Kopp, supra, to apply the legal criteria stated in that case, in measuring the dissent's argument for judicial reformation of an unconstitutional statute through excision of portions of the present CLE statute. We are unable to conclude with confidence that the Legislature would prefer, as a clearly articulated policy, to subject its own members, retired judges, and others to the CLE program which it explicitly exempted them from; and thereby retain a CLE program seemingly impervious to further constitutional challenge, but in fact subject to successive waves of lawsuits aimed at gradually invalidating additional statutory exemptions.

The Legislature, in our view, will more likely prefer invalidation of section 6070, allowing it to start anew and initiate comprehensive legislative reform of CLE, rather than accept a judicial reformation of section 6070 mandatorily expanding the burden of CLE training to those the Legislature specifically exempted therefrom.

E. CONCLUSION

We unanimously hold the CLE program as specified in section 6070 to be unconstitutional. We also decline, by majority vote, to adopt the Bar's proposal for judicial reformation of the statute in order to lessen the equal protection problems manifest in section 6070. No California case has yet supported judicial reformation of a statute

by extension of legislatively imposed burdens to members of a class the Legislature has expressly exempted therefrom, to cure an underinclusive statute denying equal protection of the law. While the Bar's implicit suggestion is that for reasons of both the public interest and constitutional theory the best CLE program would be one exempting no actively enrolled lawyers therefrom, that is not what the Legislature passed. It had the clear option and opportunity to do so, and declined to enact such a statute.

We simply cannot conclude with confidence that any particular form of the statute which we might create by "excision" would actually reflect the clearly articulated policy choices of the Legislature. [Fn. 26.] Those policy choices are matters for legislative, not judicial determination. We must invalidate the statute so that the Legislature may consider reforming it by enactment of a new, constitutional version; or await the creation by our Supreme Court of a replacement for rule 958, uninhibited

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Fn. 26. While we do not want to throw the baby out with the bath water as our dissenting colleague suggests we are doing (dis. opn., post, at p. 1), we simply lack the authority in the circumstances of this case to leave a portion of the baby in the bathtub by adopting the Bar's "excision" or "amputation" proposals. The law in question specifically exempts retired judges, legislators, and others. We would reach the height of judicial activism by "reforming" the statute so as to require those exempted lawyers to take CLE courses where there is no law now in existence requiring them to do so.

by unconstitutional exemption provisions.

In sum, we hold the CLE program is unconstitutional. It violates equal protection, by forcing some attorneys licensed by the Bar who represent individual clients in private practice, and not others, to comply with the program for reasons having no rational relationship to a legitimate state interest. The CLE program cannot be judicially reformed to close its irrational exemptions, consistent with a clearly articulated policy judgment by the Legislature and without violating its express and evident intention. Therefore, we conclude section 6070 and the CLE program adopted pursuant to section 6070, including rule 958, violate Warden's constitutional right to equal protection of the laws. [Fn. 27.]

III. DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with instructions to enter a new and different judgment declaring that section 6070 is unconstitutional, and embodying a mandatory injunction requiring the Bar to reinstate Warden to active membership. Costs are awarded to Warden.

PETERSON, P.J.

I CONCUR:

SNOWDEN, J.*

Fn. 27. Our disposition moots certain other

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contentions raised by appellant, and we need not address them at length. Specifically, we do not find that appellant's rights were violated based upon his age or his last name, which governed the onset of initial period for CLE compliance. We also conclude the Bar and its individual officers may not be sued for damages, as opposed to injunctive relief, for violation of appellant's civil rights or violation of a covenant of good faith and fair dealing, simply because they applied section 6070 as written to appellant. (See Verner, supra, 533 F.Supp. at pp. 1112-1115.) We also decline to address appellant's due process challenge, which is moot in light of our conclusion as to the equal protection issue. In addition, we do not address any questions arising under the First Amendment to the federal Contitution or the broader free speech guarantee contained in the California Constitution (art. I, sec. 2, subd.(a)) because those issues are not briefed or presented for review in this case.

* Judge of the Superior Court of Napa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CONCURRING AND DISSENTING OPINION
CALIFORNIA COURT OF APPEAL

AO72485, Warden v. State Bar of California
Haerle, J., concurring in part and dissenting in part:

I concur wholeheartedly with practically everything in the majority's opinion save and except that much of it as deals with the relief to be granted. And even as to that I agree in part: Mr. Warden is clearly entitled to be reinstated on the "active" list of the respondent California State Bar. But I do not agree that it is necessary to declare the entirety of Business and Professions Code section 6070 [fn. 1] unconstitutional; by so doing, I respectfully submit, the majority throws the baby out with the proverbial bathwater. There is, as politicians are wont to say, a better way: by excising the offending exemptions.

I agree with the majority that the permissibility of such a remedy is governed by the recent decision of our Supreme Court in Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607 (Kopp). But, unlike the majority, I read that decision as making clear (and contrary to some earlier and conflicting precedent) that an appellate court can and should reform a partially unconstitutional unconstitutional statute when to do so would further the intent of the Legislature. I agree with the majority that we must look to part IV (id. at pp. 626-662) of then Chief Justice Lucas' plurality opi-

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Fn. 1. All further statutory references are to the Business and Professions Code unless otherwise indicated.

nion for the guiding principles. The first such principle is one repeated several times in this part of the opinion, to wit, that "a court may reform--i.e., 'rewrite' --a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (iii) the enacting body would have preferred the reformed construction to invalidation of the statute." (Id. at pp. 660-661.)

Excising the three offending exceptions is, I submit, a plainly permissible method of accomplishing such a reformation. In the first place, it is clear that the presence or absence of a severability clause (there is none in section 6070 or the statute that gave birth to it) is not determinative. This is manifest from precedent both in the United States Supreme Court (see, e.g., United States v. Jackson (1968) 390 U.S. 570, 585, fn. 27) and from our own high court (see, e.g., People v. Mirmirani (1981) 30 Cal.3d 375, 387, fn. 9; Legislature v. Eu (1991) 54 Cal.3d 492, 535; City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 275.)

We come then to the question of whether a "discriminatory exemption" [fn. 2] such as is

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Fn. 2. The phraseology is that of the United States Supreme Court in Williams v. Vermont (1985) 472 U.S. 14, 23. One scholar suggests that such exemptions are treated the same as other "underinclusive" forms of legislation. (See Tribe, American Constitutional Law (2nd ed. 1988) sec. 16-4, pp. 1448-1449.)

involved here may be excised as a means of accomplishing judicial reformation. I think it is very clear that it may. Kopp itself noted that the United States Supreme Court "tacitly followed" Justice Harlan's suggested approach in Welsh v. United States (1970) 398 U.S. 333, 361 (Welsh) and "[i]n the process it effectively, albeit not always candidly, rewrote--by elimination and by addition of words--various federal and some state statutes." (Kopp, supra, 11 Cal.4th at p. 632, emphasis on "elimination" supplied.)

Justice Harlan's seminal concurring opinion in Welsh itself speaks of "amputation" and of "eliminating the exemption" as possible remedies. (Welsh, supra, 398 U.S. at p. 364 and fn. 16.) And in Champlin Rfg. Co. v. Commission (1932) 286 U.S. 210, 234, the high court stated the rule as follows: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Aside from Kopp, our own Supreme Court has noted several times that excision is a permissible form of reformation of a partially unconstitutional statute. In Gerken v. Fair Political Practices Com. (1993) 6 Cal.4th 707, 721, Justice Baxter noted in his concurring opinion: "When provisions of an initiative statute are constitutionally or otherwise invalid, the void provision must be stricken from the statute but the remaining valid provisions should be given effect if they are severable." (See also Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 330-331; Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.

3d 805, 821, 836.)

But the principal support for the relief I would prefer to see applied here comes from our high court's decision in Hayes v. Superior Court (1971) 6 Cal.3d 216 (Hayes). In that case, the court held that a criminal defendant then in prison in Nevada, but who had been granted probation by a California court without imposition of sentence, could obtain a final disposition of his California case pursuant to then Penal Code section 1203.2a notwithstanding the fact that, by its terms, that section applied only to a person who was "committed to a prison in this State." The court ruled that the quoted limitation violated the equal protection clauses. But, it went on to hold, the appropriate remedy was to strike the limitation and thus extend the benefits of the section to those in prison elsewhere than California. In so holding, it declared: "A statutory classification which arbitrarily excludes some but not all of those similarly situated in relation to the legitimate purposes of the statute does not necessarily invalidate the entire statute. [Citations.] In light of the purposes and history of a particular statute statute or an overall statutory scheme a reviewing court may correct a discriminatory classification by invalidating the invidious exemption and thus extending the statutory benefits to those whom the Legislature unconstitutionally excluded. (Id. at p. 224.)

The majority suggests that this principle obtains when the reformation operates operates to extend benefits, but not to extend "burdens." Assuming, without conceding, that the California State Bar's Minimum Con-

tinuing Legal Education (MCLE) program can be properly classified as a "burden." [Fn. 3.] I simply do not understand why the principle so carefully articulated in Hayes must be so restricted. What possible difference does it make whether the excision of the offending portion of the statute extends benefits to those formerly denied them or extends the "burdens" of the statute to those formerly provided a "discriminatory exemption" therefrom? To me, these are nothing more than opposite sides of a single coin, and the same rule should apply in both situations.

Which brings me to the final, and certainly key, question: can we "say with confidence" that (i) the statutory reform I propose, excising the three offending exemptions, would "reform the statute in a manner that closely effectuates" the Legislature's clearly articulated policy judgments, and (ii) the Legislature would have preferred section 6070 sans exemptions to the total invalidation the majority decrees? (See Kopp, supra, 11 Cal.4th at p. 661.) I think both questions must be answered in the affirmative.

At oral argument, counsel for the State

Fn. 3. I assume the majority means a "burden" on the affected attorneys; hopefully, it would agree with me that it may not be a "burden" to clients or potential clients of those attorneys, the portion of the body politic whose interests the Legislature presumably had most in mind. As to them, I assume MCLE was seen by the Legislature as a "benefit." My point is that, here as in many other instances, one persons "burden" is another person's "benefit" and vice versa.

Bar told us that (at the time section 6070 was enacted presumably) 55 legislators and 130 retired judges were effectively exempted from the requirements of the section. Appellant did not challenge those figures. No figure was offered regarding full time law school professors, but common sense tells us that figure could not be more than a few hundred. The issue then becomes: which remedy is proper under the test laid out by Kopp, the total invalidation of the entire MCLE program as decreed by the majority or the excision of three [fn. 4] "discriminatory exemptions" which benefit no more than a few hundred California lawyers? The majority argues that, since the Legislature either could or would not pass the bill in its original "Colorado" form and grafted on the exemptions at issue here (and others), it necessarily follows that the excision route is inconsistent with its "policy judgments." I disagree for at least two reasons. First of all, I respectfully suggest that the grafted exemptions patently implicated much more than the political process of getting the bill passed circa 1989 than they did the

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Fn. 4. I stress that the only issue before us is the constitutionality of the three identified exemptions. Thus, although I appreciate the reason for the majority's reference to the different treatment the statute affords full time state attorneys and that afforded full time county and city attorneys (maj. opn. at pp. 29, 30), I would note that that issue was neither briefed nor argued before us. In the same vein, although I very much share Presiding Justice Peterson's views regarding some of the more quaint aspects of current MCLE programs (maj. opn. at p. 9, fn 10, and p. 29), again I would note that these matters are simply not before us.

Legislature's "policy judgments." Second, and contrary to the majority's reasoning, Kopp makes clear that reformation of a statute can and may be in ways that run contra to express legislative action. It noted: "In each of the numerous extension cases discussed above, a court rendered a decision that effectively reformed a statute by including within its reach that which the enacting body implicitly--and sometimes expressly--excluded." (Kopp, supra, 11 Cal.4th at p. 652.)

Finally, I note that the Legislature passed section 6070 in the same session in which it was originally introduced and within almost seven months after that introduction. The final vote in favor of passage was 24 to 2 in the Senate and 71 to 1 in the Assembly. (1 Sen. final Hist. (1989-1990 Reg. Sess.) p. 630.) The legislation was, from its inception, backed by the State Bar. These factors, coupled with the already-noted fact that the exemptions benefit only a few hundred California lawyers, suggest rather strongly to me that our Legislature would much prefer excising the offending exemptions to invalidating the entire statute. [Fn. 5.] Or, to put matters

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Fn. 5. The majority suggests that the real choice is between invalidating the exemptions and "allowing [the Legislature] to start anew and initiate comprehensive . . . reform of CLE . . . ." (Maj., opn. at p. 31.) I suggest (a) this formulation of the alternatives represents a clear leap of faith and (b) we should not be suggesting to the Legislature how to "reform" MCLE in respects that are not clearly our business. (See fn. 4, ante.)

as the Kopp court did (paraphrasing now-Justice Ginsburg of the United States Supreme Court), we can and should reform the law because "invalidating a statute would be far more destructive of the electorate's ate's will." (Kopp, supra, 11 Cal.4th at p. 661.)

In short, I would order the State Bar to re-enroll appellant in its active rolls and that the exemptions from MCLE allowed by section 6070 and the companion State Bar rule pertaining to legislators, retired judges and law school professors be stricken as being, for all the reasons so ably explained by the majority, in violation of the equal protection clauses of the United States and California Constitutions.

_____

Haerle, J.

APPENDIX C

CALIFORNIA SUPREME COURT ORDER DENYING REHEARING

First Appellate District, Division Five
No. AO72485

IN THE SUPREME COURT OF CALIFORNIA

SO60702

LEW WARDEN,

Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Respondent.

SUPREME COURT
FILED
OCT 20 1999
Robert Woodruff, Clerk
/s/ B. Mines
Deputy

Petition for rehearing DENIED.

Kennard, J., and Brown, J., are of the opinion the petition should be granted.

/s/ George
Chief Justice

(3)
Supreme Court, U.S.
FILED
991194 JAN 14 2000
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LEW WARDEN,

Petitioner,

vs

THE STATE BAR OF CALIFORNIA,
LORNA MAYNARD, CAROLE ROSSI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

VOL. II
Appendices D - F, pp. 123-204

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APPENDIX D

ALAMEDA COUNTY SUPERIOR COURT JUDGMENT

ENDORSED
FILED
ALAMEDA COUNTY
Oct 18 1995
CLERK OF THE SUPERIOR COURT
By KATE BUCKNER, Deputy

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[Other counsel omitted.)
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San Francisco, CA 94102
[Other counsel omitted.)

Attorneys for Defendants Lorna Maynard, Carole Rossi, and the State Bar of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LEW WARDEN,	)	Case No.
Plaintiff,	)	734372-4
	)	
v.	)	JUDGMENT BY
	)	COURT UNDER
THE STATE BAR OF CALIFORNIA, et al.,	)	CODE OF CIVIL PROCEDURE Sec. 437c
	)	
Defendants.	)	
	)	

This Court on September 14, 1995, having granted the motion of defendants State Bar of California, Lorna Maynard and Carole Rossi for summary adjudication of issues and having so determined that there was no

admissible evidence [Fn. 1] to support any of the several claims or causes of action for injunctive and/or declaratory relief and/or for recovery of a monetary damage, as attempted to be alleged in plaintiff's complaint, and having additionally determined that defendants and each of them are immune from liability for any such damages, and there having been no alleged claim or causes of action in plaintiff's complaint not so disposed of by said order of September 14th, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff shall take nothing, and that defendants State Bar, Maynard and Rossi shall recover from plaintiff costs of suit.

Dated: Oct 18, 1995.

SANDRA MARGULES
Judge of the Superior Court.
PURSUANT TO C.C.P. 635
for Hon. JAMES R. LAMDEN,
Judge.

Fn. 1. In ruling on said motion the Court considered only those portions of plaintiff's evidentiary submissions in opposition to the motion that were competent, relevant, and admissible. Biljac v. First Interstate (1990) 218 CA3d 1410.

ORDER GRANTING SUMMARY JUDGMENT

ENDORSED
FILED
ALAMEDA COUNTY
Sep 14 1995
RONALD G. OVERHOLT, EXEC.OFF.Clerk
By Phil Seane

DIANE C. YU, State Bar No. 78676
[Other counsel omitted.)
OFFICE OF GENERAL COUNSEL
THE STATE BAR OF CALIFORNIA
555 Franklin Street
San Francisco, CA 94102
[Other counsel omitted.)

Attorneys for Defendants Lorna Maynard, Carole Rossi, and the State Bar of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LEW WARDEN,	)	Case No.
Plaintiff,	)	734372-4
	)	
v.	)	ORDER GRANT-
	)	ING SUMMARY
THE STATE BAR OF CALIFORNIA, et al.,	)	ADJUDICATION OF ISSUES
	)	
Defendants.	)	
	)	

The motion of defendants the State Bar of California, Lorna Maynard and Carole Rossi's (hereinafter "Defendants") motion for summary judgment came on regularly for hearing in the above-entitled Court, before the Honorable JAMES R. LAMBDEN, Judge pre-

siding. Colin P. Wong and Robert M. Sweet appeared as attorneys for Defendants and Plaintiff Lew Warden appeared in pro. per.

After full consideration of the evidence, and the separate statements submitted by counsel, as well as oral argument by counsel, the Court finds there is no triable issue of material fact as to the following claims asserted in the pleadings of plaintiff and that summary adjudication should be granted for the following reasons:

(1) There is no evidence that Plaintiff was denied procedural due process;

(2) There is no evidence that Plaintiff was denied equal protection;

(3) There is no evidence that Defendants breached an express or implied contract;

(4) There is no evidence that a cause of action for tortious breach of implied covenant of good faith and fair dealing;

(5) There is no evidence that Plaintiff's federal civil rights were breached and the evidence shows that Defendants are not "persons" within the meaning of 42 U.S.C. Section 1983;

(6) There is no evidence that Plaintiff is entitled to punitive damages; and

(7) Defendant's licensing activity immunity under government code sections 818.4 And 821.2 and common law quasi-judicial and legislative immunity from liability for damages is a defense to Plaintiff's tort claim for damages.

IT IS THEREFORE ORDERED that said motion for summary adjudication of issues is Granted and that the final judgment in this action shall, in addition to any other matters determined at trial, award judgment in accordance with the matters so adjudicated.

/s/ James R. Lambden
Judge of the Superior Court

APPENDIX E

CALIFORNIA
BUSINESS AND PROFESSIONS CODE

MANDATORY CONTINUING LEGAL EDUCATION
[Added Stats 1989 ch 1425 sec 2.]

Section 6070. Establishment of program
(a) The State Bar shall request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that, within designated 36-month periods, all active members of the State Bar shall complete at least 36 hours of legal education activities approved by the State Bar or offered by a State Bar approved provider, with eight of those hours in legal ethics or law practice management, four hours of which shall be legal ethics. If the California Supreme Court adopts a rule authorizing the State Bar to administer the program, the State Bar shall establish and administer a mandatory continuing legal education program commencing on or after January 1, 1991. A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar.

(b) For purposes of this section, statewide associations of public agencies and incorporated, non-profit professional associations of attorneys, shall be certified as State Bar providers by an appropriate application process to be est-

ablished by the State Bar. The certification may be revoked only by majority vote of the board, after notice and hearing, and for good cause shown. Programs provided by the California District Attorneys Association or the California Public Defenders Association, or both, including but not limited to programs provided pursuant to Title 1.5 (commencing with Section 11500) of Part 4 of the Penal Code, are deemed to be legal education activities approved by the State Bar or offered by a State Bar approved provider.

(c) Notwithstanding the provisions of subdivision (a), retired judges, officers and elected officials of the State of California, and full- time professors at law schools accredited by the State Bar of California, the American Bar Association, or both, shall be exempt from the provisions of this section. Full-time employees of the State of California, acting within the scope of their employment, shall be exempt from the provisions of this section. Nothing in this section shall prohibit the State of California, or any political subdivision thereof, from establishing or maintaining its own continuing education requirements for its employees.

* * *

UNLAWFUL PRACTICE

Section 6125. Practice without active membership

No person shall practice law in this State unless he is an active member of the State Bar.

* * *

APPENDIX F

CALIFORNIA RULES OF COURT

Rule 958.
(a) [Statutory authorization] This rule is adopted under section 6070 of the Business and Professions Code.

(b) The State Bar shall establish and administer a minimum continuing legal education program, beginning on or after January 1, 1991, under rules adopted by the Board of Governors of the State Bar. These rules may provide for carry forward of excess credit hours, staggering of the educational requirement for implementation purposes, and retroactive credit for legal education approved by the State Bar or offered by a State Bar approved provider completed prior to the effective date of the program.

(c) Each active member of the State Bar (1) not exempt under Business and Professions Code section 6070, (2) not a full-time employee of the United States Government, its departments, agencies, and public corporations, acting within the scope of his or her employment, and (3) not otherwise exempt under rules adopted by the Board of Governors of the State Bar, shall, within 36-month periods designated by the State Bar, complete at least 36 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Eight of those hours shall address legal ethics or law practice management, four hours of which shall be in legal ethics. Members may be required to complete legal education in other specified areas within the 36-hour requirement under rules adopted by the State Bar. Each active member

shall report his or her compliance to the State Bar under rules adopted by the Board of Governors of the State Bar.

(d) A member of the State Bar who fails to satisfy the requirements of the State Bar's minimum continuing legal education program shall be enrolled as an inactive member of of the State Bar under rules adopted by the Board of Governors of the State Bar.

(e) The State Bar shall have the authority to set and collect appropriate fees and penalties.
[Adopted by the Supreme Court Dec. 6, 1990.]

* * *

APPENDIX G

CALIFORNIA STATE BAR RULES
MCLE RULES AND REGULATIONS

[Adopted December 8, 1989; Amended July 13, 1991, July 11, 1992.]

Rule 1.0. Purpose

Continuing legal education is required of all active members of the State Bar of California not specifically exempted from this requirement to assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices.

Rule 2.0. Minimum Continuing Legal Education Requirement

2.1. Requirement. Except as otherwise provided, all active members of the State Bar of California shall complete at least 36 hours of approved continuing legal education activities every 36 months. Of the 36 hours:

2.1.1. At least eight shall be in the area of legal ethics and/or law practice management, with at least four of the eight hours in legal ethics;

2.1.2. At least one shall relate to prevention, detection, and treatment of substance abuse and emotional distress; and

2.1.3. At least one shall relate to elimination of bias in the legal profession based on any of, but not limited to the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation. Instruction in legal ethics, prevention, detection, and treatment of substance abuse and emotional distress, and elimination of bias may be a portion of a substantive law education activity.

2.2. Amount of Self-study. Up to but not more than 18 hours credit may be given for self-study activities during any compliance period.

Rule 3.0. Compliance Period

3.1. Initial Compliance Period. The initial compliance period shall begin on February 1, 1992. Except for the initial compliance period for Compliance Groups 2 and 3, members referred to in section 6.1, and members admitted or readmitted after February 1, 1992, all compliance periods shall be 36 months in length and shall begin the day after the end of the previous compliance period.

3.2. Compliance Group 1. Members whose last names begin with A--G on February 1, 1992 shall be permanently assigned to Compliance Group 1. The initial compliance period for Compliance Group 1 shall end on January 31, 1995.

3.3. Compliance Group 2. Members whose last names begin with H--M on February 1, 1992 shall be permanently assigned to Compliance Group 2. The initial compliance period for Compliance Group 2 shall end on January 31, 1994. During the initial compliance period, members assigned to Compliance Group 2 shall be required to complete at least 24 hours of approved continuing legal education activities. Of the 24 hours:

3.3.1. At least five shall be in the areas of legal ethics and/or law practice management, with at least three of the five hours in legal ethics; and

3.3.2. No more than 12 hours credit may be given for self-study activities. During the initial compliance period only, such members shall not be required to complete one hour of approved continuing legal education relating to prevention, detection,

and treatment of substance abuse and emotional distress or elimination of bias in the legal profession.

3.4. Compliance Group 3. Members whose last names begin with N--Z on February 1, 1992 shall be permanently assigned to Compliance Group 3. The initial compliance period for Compliance Group 3 shall end on January 31, 1993. During the initial compliance period, members assigned to Compliance Group 3 shall be required to complete at least 12 hours of approved legal education activities. Of the 12 hours:

3.4.1. At least three shall be in the areas of legal ethics and/or law practice management, with at least one and one-half of the three hours in legal ethics; and

3.4.2. No more than six hours credit may be given for self-study activities.

During the initial compliance period only, such members shall not be required to complete one hour of approved continuing legal education relating to prevention, detection, and treatment of substance abuse and emotional distress or elimination of bias in the legal profession.

3.5. Compliance Period for Members Admitted or Readmitted after February 1, 1992. [Omitted as not pertinent to this appeal.]

Rule 4.0. Categories of Credit [Omitted as not pertinent to this appeal.]

Rule 5.0. Computation of Credit Hours [Omitted as not pertinent to this appeal.]

Rule 6.0. Special Cases and Exemptions

6.1. Prescribed Exemptions. In accordance with Business & Professions Code section 6070 and California Rule of Court 958, the

following are exempt from the continuing legal education requirement:
6.1.1. Retired judges;
6.1.2. Officers and elected officials of the State of California;
6.1.3. Full-time professors at law schools accredited by the State Bar, the ABA, or both; 6.1.4. Full-time employees of the State of California acting within the scope of their employment. For the purposes of this section, "full-time employees of the State of California acting within the scope of their employment" shall refer to members employed by the State of California as attorneys or Administrative Law Judges on permanent or probationary basis, regardless of their working hours, who do not practice law in California except as employees of the State of California; and
6.1.5. Full-time employees of the United States Government, its departments, agencies, and public corporations, acting within the scope of their employment. For the purposes of this section, "full-time employees of the United States Government, acting within the scope of their employment" shall refer to members employed by the United States Government, its departments, agencies and public corporations, as attorneys or Administrative Law Judges on a permanent or probationary basis, regardless of their working hours, who do not practice law except as employees of the United States Government, its departments, agencies, and public corporations. [Remainder of paragraph omitted as not pertinent to this appeal.]

6.2. Good Cause Exemption From or Modification of Requirement. A member may file a written request setting forth good cause for an exemption from compliance with or modification of any of the requirements, including an extension of time for compliance, in accordance

with a procedure to be established by the Committee on Mininum Continuing Legal Education. 6.2.1. Should the decision be adverse to the member, the member may appeal such decision pursuant to the provisions of California Rule of Court 952(c).

6.3. Attestation of Exemption From or Modification of The Requirement. Members claiming exemption from or modification of the minimum continuing legal education requirement shall attest to or furnish such substantiation of their exempt status or modification of the requirement as the State Bar may require.

Rule 7.0. Standards of Approval of Education Activities. [Omitted as not pertinent to this appeal.]

Rule 8.0. Approval of Individual Education Activities. [Omitted as not pertinent to this appeal.]

Rule 9.0. Approval of Providers. [Omitted as not pertinent to this appeal.]

9.1 Statewide Associations of Public Agencies and Incorporated Non-Profit Associations of Attorneys.

Statewide associations of public agencies and incorporated, non-profit professional associations of attorneys shall be certified as State Bar approved providers upon completion of the application process.

9.2 Requirements for Approval of Providers. [Omitted as not pertinent to this appeal.]

9.3. Revocation of Provider Approval. The approval of any provider referred to in section 9.1 may be revoked only by a majority of the Board of Governors, after notice

and hearing, and for good cause. The approval of all other approved providers

9.4. Approval of Subdivisions of Approved Providers. [Omitted as not pertinent to this appeal.]

Rule 10.0. Member Request for Education Activity Approval [Omitted as not pertinent to this appeal.]

Rule 11.0. Activity and Provider Approval Fee [Omitted as not pertinent to this appeal.]

Rule 12.0. General Compliance Procedures [Omitted as not pertinent to this appeal.]

Rule 13.0. Non-Compliance Procedures
13.1 What Constitutes Non-Compliance
Non-Compliance shall include any of the following:
13.1.1. Failure to complete the educational requirements within the compliance period or any granted extension thereof;
13.1.2. Failure to provide attestation of compliance (including attestation of exempt status);
13.1.3. Failure to provide satisfactory evidence of compliance (including evidence of exempt status) within the prescribed time after a request by the State Bar;
13.1.4. Failure to satisfy the education requirement and furnish evidence of such compliance within 60 days after receipt of a Non-Compliance Notice; or
13.1.5. Failure to pay a non-compliance fee within the time prescribed after a request by the State Bar.

13.2. Non-Compliance Notice and 60 Day Period to Attain Compliance. Members failing to comply will receive a Non-Compliance Notice stating the specific discrepancy and will be given

60 days from the date of notification to file a response clarifying the discrepancy or otherwise showing compliance with the requirements. Such notice shall contain the following language near the beginning of the notice, in capital letters:

IF YOU FAIL TO PROVIDE ADEQUATE PROOF OF COMPLIANCE WITH THE MINIMUM CONTINUING EDUCATION REQUIREMENT BY (INSERT DATE 60 DAYS FROM DATE NOTICE IS SENT), YOU SHALL BE ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNTIL SUCH TIME AS ADEQUATE PROOF OF COMPLIANCE IS RECEIVED BY THE STATE BAR.

Members given 60 days to respond to a Non-Compliance Notice may use this 60 day period to attain the adequate number of credit hours for compliance. Credit hours earned during this period may be counted toward compliance with the prior compliance period's requirement unless hours in excess of the requirement are earned, in which case the excess hours may be counted toward meeting the current compliance period's requirement.

13.3. **Non-Compliance Fee.** A member who, for whatever reason, is in non-compliance at the end of the compliance period shall pay a non-compliance fee upon request. Failure to pay the non-compliance fee within the prescribed time after a request by the State Bar shall constitute non-compliance with the requirements.

Rule 14.0. Consequences of Non-Compliance

14.1. Enrollment as Inactive Member. A member failing to comply with the requirements after the 60 day period for compliance has expired shall be enrolled as an inactive member by the Board of Governors or an officer of the State Bar or his or her designee.

14.2. Enrollment as Inactive Member Administrative Process The enrollment pursuant to

these rules and regulations is administrative in nature and no hearing is required.

14.3. Accrual of Membership Fee Membership fees shall continue to accrue at the active rate against a member during the period he or she is enrolled as an inactive member pursuant to section 14.1.

Rule 15.0. Reinstatement [Omitted as not pertinent to this appeal.]

Rule 16.0. Committee on Minimum Continuing Legal Education [Omitted as not pertinent to this appeal.]

Rule 17.0. Confidentiality A member's status relating to the minimum continuing legal education requirements, as it relates to the compliance, non-compliance, or exempt status of the member, is not confidential and shall be disclosed upon request of any interested person. Other information provided to the State Bar or its representatives pursuant to these regulations shall be available for public inspection during business hours, except to the extent that disclosure is prohibited by law. Requests for lists of members shall be subject to the State Bar's Membership Lists Policy.

* * *

APPENDIX H

PLAINTIFF'S COMPLAINT

FILED
ALAMEDA COUNTY
May 02 1994
Ronald G. Overholt
Exec.Off.Clerk
By Alphomine Oates

LEW WARDEN
114 Parrott Street
San Leandro, California
(510) 483-3900

Plaintiff in Pro. Per.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

LEW WARDEN, Plaintiff, vs THE STATE BAR OF CALIFORNIA, KAHALA MOTOYAMA, LORNA MAYNARD, CAROLE ROSSI, and Does ONE through ONE HUNDRED, Defendants.	No. 734372-4 COMPLAINT FOR DAMAGES, DECLARATORY RELIEF, INJUNCTION, MANDATE SUMMONS ISSUED

Plaintiff complains of the defendants, and each of them, and for causes of action alleges as follows:

I

The true names and capacities of the defendants Does One through One Hundred,

whether individual, corporate, associate, or otherwise, are unknown to plaintiff other than that they are individuals associated with the State Bar of California as officers, agents, servants, employees, and other capacities presently unknown to plaintiff, who, for the purposes of personal gain and professional aggrandizement at the expense of plaintiff and all other members of the State Bar of California similarly situated as plaintiff, planned, promulgated, organized, administered, and enforced a certain regulation of the State Bar of California known as the Minimum Continuing Legal Education of the Bar program.

II

At all times herein mentioned, and but for the acts of the defendants referred to herein, plaintiff's profession and principal means of livelihood is and has been that of an attorney. Plaintiff was and, but for the actions of the defendants, and each of them, referred to herein, has been a member of the State Bar of California, since 1953, admitted to the practice of the law before all California courts, the United States District Courts for the several districts of California, the Tax Court of the United States, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Plaintiff, at all times herein mentioned, and except for the acts of the defendants referred to herein, has continuously been in good standing, without censure, public or private, and of good repute as a dedicated, capable, and ethical attorney. But for the conduct of the defendants, and each of them, referred to herein, plaintiff still would be licensed to practice his said profession before all such courts.

III

On or about July 19, 1993, the defendants, and each of them, wrongfully, without

first affording plaintiff due notice and opportunity to be heard in the manner provided by law, and contrary to the Constitutions of the United States and the State of California, caused the suspension of plaintiff's license to practice law solely on the ground that plaintiff had failed to comply with the said Minimum Continuation Legal Education of the Bar program.

IV

Thereafter, said defendants, and each of them, caused notice of such suspension to be sent to the United States District Court of the Northern District of California, and thereby caused the Chief Judge of said Court to order that plaintiff be barred from the practice of the law before said United States District Court.

V

Plaintiff is informed and so believes and therefore alleges that said defendants, and each of them, in so sending notice to the United States District Court, did so for the purpose of hurting and harming plaintiff and causing him to be barred from the practice of law before said United States District Court rather than take action directly against plaintiff in such manner as would have required the defendant State Bar of California and such other defendants so acting to have afforded plaintiff opportunity to be heard by and before the courts of the State of California, which such latter action would have caused the Supreme Court of the State of California and its agencies to review and consider the constitutionality of the said Minimum Continuing Legal Education of the Bar program.

VI

Thereafter, said defendants, and each of them, according to plaintiff's information and belief, caused delivery to the California Lawyer, the monthly magazine ostensibly devoted to discussing matters of common interest

to members of the State Bar, to be suspended, which act, plaintiff verily believes, was done by said defendants to prevent plaintiff and other members of the State Bar similarly situated and disposed from learning of each other's complaints concerning said Minimum Continuing Legal Education of the Bar program and thereby joining forces to bring about the demise of said program.

VII

Said Minimum Continuing Legal Education of the Bar program, both in the form in which it was caused to be created, and in the manner in which it has been applied to plaintiff as alleged herein, violates the Equal Protection and Due Process clauses of the United States and the State of California in that, among other things, it discriminates against plaintiff because of his age, his birthday being February 17, 1920, his name, which commences with the letter "W", and the manner in which he practices his profession, that is, as a sole private practitioner, not a member of a large law firm, or an employee of a governmental agency practicing law in the State of California, or a member of the State Legislature, or a retired judge, or any other capacity exempted from the provisions of said program, because it is not reasonably or rationally related to a legitimate governmental interest, in that it does not reasonably and uniformly promote or insure the competency of all members of the State Bar engaged in the practice of the law in the State of California, in that it makes no provision for hearing before a State Bar member's license to practice law can be suspended, and in that the defendants herein, acting under the ostensible authority of said program, arbitrarily suspended plaintiff's license to practice law without first affording him a hearing before an impartial judge knowing that

plaintiff desired to make such constitutional objections to said program and its administration.

VIII

Said Minimum Continuing Legal Education of the Bar program denies plaintiff the equal protection of the laws in that plaintiff, at the time said defendants suspended plaintiff's license to practice law, was 73 years of age. Because said program purports to divide State Bar members into "compliance" groups (Rule 3.0) and calls for different dates of compliance by the several compliance groups based upon alphabetical divisions, with members whose last names begin with the letters N to Z being required to comply with the program's criteria by January 31, 1993, as distinguished from members whose names begin with the letters H to M being required to comply by January 31, 1994, and members whose names begin with the letters A to G being required to comply by January 31, 1995, plaintiff is and was disfavored in the order of 2 years of opportunity to practice his profession over members who have their names begin with the letters A to G. At any stage of a member's life, such a discrimination would be significant; at plaintiff's age, it was catastrophic and particularly damaging to plaintiff.

IX

Said Minimum Continuing Legal Education of the Bar program further denies plaintiff the equal protection of the laws in that plaintiff, at the time said defendants suspended his said license to practice law, was engaged in general practice of the law as a solo practitioner, and thus, by the program's arbitrary and discriminatory classifications, is subject to the program. However, the program specifically exempts members who are retired judges (Rule 6.1.1.), officers and elected officials of the State of California (6.1.2.), full time professors at law schools accredited

by the State Bar or the ABA (6.1.3.), and employees of the State of California (6.1.3.) and the United States government. Further, in practice, the defendant State Bar allows large law firms to conduct their own "in house" educational programs while requiring less favored members to attend expensive, time-consuming, and wasteful lectures of dubious educational content which require nothing more of the attendee than that he pay his money and sign in to verify his attendance, leaving him to listen, sleep, or depart as his conscience might direct.

X

Plaintiff is informed and so believes and therefore alleges that there is no reasonable or rational basis for excluding from the requirements of said program, and thus discriminating against plaintiff and other disfavored members of the State Bar similarly situated, such favored members of the State Bar who practice law in the State of California, often in competition with and as adversaries of less favored members, and who, in fact, in plaintiff's experience, are at least as much in need of continuing professional education as less favored members, and who serve the public in such manners as to cause their presumptive want of professional skill and and knowledge to have a much greater adverse impact upon the citizens of the State of California than such presumptive want of professional skill and knowledge on the part of less favored members.

XI

Plaintiff is informed and so believes and therefore alleges that defendants, and each of them, in promoting and promulgating said program, intentionally provided for the exclusions referred to herein above in order to not antagonize politically power-

ful and organized groups of members of the State Bar who would have opposed said program had they been subject to its terms, and thus assure its creation, together with their own personal and professional gain and aggrandizement, at the expense of the other members of the State Bar who have no organization to represent them other than the defendant State Bar itself.

XII

Said Minimum Continuing Legal Education of the Bar program violates the Equal Protection and Due Process clauses of the United States and the State of California constitutions in that it in fact has no reasonable relation to any legitimate governmental purpose in that it does not in fact provide for and/or insure minimum educational standards uniformly applied to all members of the State Bar, and in that said program discriminates between those members who are in need of further education and those who are not, there being no provision for examination to determine professional competence, either prior to compulsory participation in the program or after ostensible compliance.

XIII

Plaintiff is informed and so believes and therefore alleges that had the defendants, and each of them, been truly interested in assuring the continuing competency of members of the State Bar serving the public, rather than in advancing their personal and professional fortunes by the practice commonly referred to as "empire building," which is what has occurred with said Minimum Continuing Legal Education of the Bar program, said defendants would have, for example, utilized the medium of the California Lawyer, formerly known as the State Bar Journal before it was junked by said defendants, to keep members of the State Bar continually educated, and not necessarily mini-

mally, by means of learned articles discussing both new and established principles of law, whether promulgated by statute or appellate court decisions, which used to be the practice of the State Bar Journal, rather than the present practice of the California Lawyer gossiping about the comings, goings, and doings of mega-law firms and advancing the personal and political agendas of those members who control the State Bar and said publication, and further, could have assured the public that the members of the State Bar were indeed currently competent by simple tests, such as are given by the Department of Motor Vehicles to assure the knowledge of California motorists of the principles of law applicable to the safe operation of a motor vehicle, which tests, again, could be given and administered via the medium of the California Lawyer, all at continuing minimum expense and burden to the members of the State Bar, with written test scores to assure the general public that its interests were truly being served. But such a rational program would not be acceptable to defendants who would then have no empire to lord over and thereby justify their existence and burden on the members of the State Bar.

XIV

By reason of the premises, plaintiff has been denied substantive due process of law in that, among other things, the said Minimum Continuing Legal Education of the Bar program, for the reasons stated herein above, is arbitrary, unreasonable, and has no substantial relation to the public health, safety, morals, or general welfare.

XV

By reason of the premises, plaintiff has been denied procedural due process of law in that his license to practice his profession and thereby earn his livelihood has been suspended without first afford-

ing him a hearing.

XVI

That upon plaintiff's admission to the practice of law in the State of California, a written and unwritten contractual relationship was established and thereafter at all times herein mentioned continued between plaintiff and said defendants, and each of them, which included the implied covenant that said defendants, at all times, would act fairly toward and in good faith with plaintiff and other members similarly situated.

XVII

By reason of the premises, the defendants, and each of them, have, both contractually and tortiously, breached said implied covenant of good faith and fair dealing.

XVIII

In doing the wrongful acts referred to herein, defendants, and each of them, acted and conspired to act under color of state law to deprive plaintiff and other members of the State Bar of his and their civil rights guaranteed by the Constitutions of the United States and the State of California, and damages ought to be assessed against each said defendant as provided by law for the redress of said wrongs and vindication of said rights.

XIX

By reason of the premises, plaintiff has suffered special damages for loss of income from the practice of the law in such sums as shall be established at the time of trial.

XX

By reason of the premises, plaintiff has suffered severe emotional distress and has been damaged in such sums as shall be established at the time of trial.

XXI

By reason of the premises, plaintiff has suffered general damages in such sums as shall be established at the time of trial.

XXII

In doing the wrongful acts referred to herein, the defendants, and each of them, acted with a calloused disregard for the rights and sensibilities of plaintiff and other members similarly situated, and punitive damages ought to be assessed against each said defendant found to be so acting in the sums of not less than $100,000 per defendant to punish each said defendant, and to provide an example and deter and discourage similar wrongful conduct by said defendant and others similarly situated and so disposed.

XXIII

On or about October 1, 1993, plaintiff caused a claim of damage to be served upon the defendant State Bar of California, which claim of damage was denied on or about November 5, 1993.

WHEREFORE, plaintiff prays for judgment as follows:

1. For a judgment declaring said Minimum Continuing Legal Education of the Bar program to be unconstitutional, void, and of no force or effect;

2. For an order directing the State Bar of California to rescind its order suspending plaintiff's license to practice law and enjoining defendants, and each of them, from further interfering with plaintiff's right to practice law;

3. For an order directing the State Bar of California to restore the licenses of every other member of the State Bar whose license to practice law was suspended by reason of said member's failure to comply with said Minimum Continuing Legal Education of the Bar program, and to give each said member written notice of said action;

4. For an order directing the State Bar of California to inform, in writing, each

court or tribunal which the State Bar had informed of its suspension of plaintiff's, and every other member's, license to practice law, of this judgment;

5. For special damages according to proof at the time of trial;

6. For general damages according to proof at the time of trial;

7. For punitive damages according to proof at the time of trial;

8. For attorney's fees according to proof at the time of trial;

9. For costs of suit; and

10. For such other and further relief as to the court may seem just and proper.

Dated: April 27, 1994.

_____

Lew Warden, Plaintiff.

APPENDIX I

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

FILED
ALAMEDA COUNTY
Aug 28 1995
Ronald Overholt, Exec Off/Clerk
By Ed Cranston

(Caption omitted.)

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A. DEFENDANTS HAVE FAILED TO SUSTAIN THEIR BURDEN OF PROVING THAT NO TRIABLE ISSUES OF MATERIAL FACT EXIST AND THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

B. MULTIPLE TRIABLE ISSUES EXIST THAT (1) THE STATE BAR'S SUSPENSION OF PLAINTIFF AND OTHERS SIMILARLY SITUATED FROM THE PRACTICE OF LAW WITHOUT A HEARING DENIED PLAINTIFF DUE PROCESS OF LAW, (2) THE MANY EXEMPTIONS FROM THE MCLE PROGRAM VIOLATE EQUAL PROTECTION, (3) THE NAME AND AGE DISCRIMINATIONS OF THE COMPLIANCE PERIODS VIOLATE EQUAL PROTECTION, (4) DEFENDANTS CONSPIRED TO CAUSE PLAINTIFF'S SUSPENSION SO AS TO COMPEL HIM TO ABANDON HIS CONTENTIONS OF UNCONSTITUTIONALITY, (5) DEFENDANTS BREACHED THEIR DUTY TO ACT FAIRLY AND IN GOOD FAITH TOWARD PLAINTIFF, (6) DEFENDANTS ACTED UNDER COLOR OF STATE LAW AND ARE LIABLE UNDER THE FEDERAL CIVIL RIGHTS ACTS, (7) INJUNCTIVE RELIEF AND (8) PUNITIVE DAMAGES ARE PROPER.

1. Plaintiff's right to pursue his profession was taken without first affording him due process of law.

2. The many exemptions from the MCLE program denied plaintiff the equal protection of the laws.

3. The name classification of the MCLE program's compliance periods denied plaintiff the equal protection of the laws, and, because of his age, was particularly damaging to him.

4. Defendants are liable to plaintiff for a fraudulent conspiracy to cause or allow his suspension from the practice of law.

5. Defendants breached their duty to act toward plaintiff fairly and in good faith.

6. Plaintiff had established sufficient facts for a cause of action under the federal Civil Rights Acts.

7. Injunctive or mandatory prohibition relief is appropriate.

8. Punitive damages are appropriate.

* * *

APPENDIX J

PLAINTIFF'S EVIDENCE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

FILED
ALAMEDA COUNTY
AUG 28 1995

(Caption omitted.)

EXHIBIT A
PLAINTIFF'S DECLARATION AND REQUEST FOR JUDICIAL NOTICE OF FACTS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION OF ISSUES

LEW WARDEN, under penalty of perjury, declares as follows:

I am the plaintiff in the within action. and, if called as a witness, I can and will testify competently as to the following matters of fact which are true of my own knowledge, and which, where so identified below, may also be judicially noticed by the court.

Plaintiff requests that the court judicially notice each matter of fact identified below as a proper matter for judicial notice by the term "Judicial Notice".

Fact No. 1: From the time of my admission to the State Bar by the California Supreme Court in 1953, and at all times since until the action taken by the defendant State Bar in July 1993 in summarily suspending my right to practice law--an act which is euphemistically referred to by defendant State Bar as "enrolled as an inactive member"--for failure to comply with the educational requirements

of the Minimum Continuing Legal Education of the Bar, herein after referred to as the "MCLE program", I have been duly admitted to appear before and be heard by all the courts of the State of California by the Supreme Court of the State of California, in good standing with each of said courts, and duly authorized to practice law in the State of California.

Fact No. 2: Until the action taken by the defendant State Bar in summarily suspending my right to practice law, I was duly admitted to practice before, and in good standing with, the United States District Courts for the Northern, Central, and Southern Districts of California, the Tax Court of the United States, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

Fact No. 3: At all times since I was first admitted to the practice of law in California, until the action taken by the State Bar in suspending my right to practice law, I have been in good standing with the State Bar, without any censure, public or private for any unlawful or unethical conduct.

Fact No. 4: At the time the defendant State Bar summarily suspended my right to practice law, my sole means of earning the livelihoods of myself and my wife was the practice of law.

Fact No. 5: (Judicial Notice.) The practice of law includes such activities as appearing before and being heard by a court of law, giving legal advice, and preparing legal documents. (Admitted by State Bar's response to plaintiff's Request for Admission no. 5.)

Fact No. 6: (Judicial Notice.) Only active

members of the State Bar of California may lawfully practice law in California. (Admitted by State Bar's response to plaintiff's Request for Admission no. 6.)

Fact No. 7: (Judicial Notice.) Only active members of the State Bar can receive monetary compensation for practicing law in California. (Admitted by State Bar's response to plaintiff's Request for Admission no. 7.)

Fact No. 8: (Judicial Notice.) Inactive members of the State Bar may not lawfully practice law in California. (Admitted by State Bar's response to plaintiff's Request for Admission no. 8.)

Fact No. 9: (Judicial Notice.) Criminal penalties may be imposed on an individual unlawfully practicing law in California. (Admitted by State Bar's response to plaintiff's Request for Admission no. 6.)

Fact No. 10: (Judicial Notice.) Rule 13 of the MCLE rules, in pertinent part, provides as follows:

13.1 What Constitutes Non-Compliance
Non-Compliance shall include any of the following:
13.1.1 Failure to complete the educational requirements within the compliance period or any granted extension thereof;
13.1.2 Failure to provide satisfactory attestation of compliance (including evidence of exempt status);
13.1.3 Failure to provide satisfactory evidence of compliance (including evidence of exempt status) within the prescribed time after a request by the State Bar;
13.1.4 Failure to satisfy the education requirement and furnish evidence of such compliance within 60 days after receipt of

a Non-Compliance Notice; or
13.1.5 Failure to pay a non-compliance fee within the time prescribed after a request by the State Bar.
Fact No. 11: MCLE Rule 14.1 defines "enrollment as an inactive member" as meaning that a member so enrolled "will not be permitted to practice law until such time as adequate proof of compliance" with Rule 13.1 of the MCLE Rules has been received by administrators of the MCLE program.

Fact No. 12: (Judicial Notice.) MCLE Rule 14.0 and its subparts provide as follows:
14.0 CONSEQUENCES OF NON-COMPLIANCE
14.1 Enrollment as Inactive Member
A member failing to comply with the requirements after the 60 day period for compliance has expired shall be enrolled as an inactive member by the Board of Governors or an officer of the State Bar or his or her designee.
14.2 Enrollment as Inactive Member Administrative Process
The enrollment pursuant to these rules and regulations is administrative in nature and no hearing is required.
14.3 Accrual of Membership Fee
Membership fees shall continue to accrue at the active rate against a member during the period he or she is enrolled as an inactive member pursuant to section 14.1.

Fact No. 13: (Judicial Notice.) To enroll an active member of the State Bar as an inactive member pursuant to Rule 14 of the MCLE Rules is the same, in substance and effect, as to suspend such member's right to practice law.

Fact No. 14. (Judicial Notice.) The enrollment of a member of the State Bar as an inactive member pursuant to the MCLE rules has the same effect as disbarment, except that a

disbarred attorney is no longer liable for State Bar dues, that prior to his disbarment he is afforded full and fair notice of the charges against him and opportunity to be heard why action should not be taken against him, and that he is not disbarred until the the Supreme Court of the State of California has reviewed the matter and so ordered.

Fact No. 15. On July 9, 1993, after receiving notice from the State Bar dated June 29, 1993 (Plf. Depo, Bar Ex. 1(a), sub. #5) that I was not in compliance with the MCLE Rules and Regulations, that I would be suspended from the practice of law effective July 19, 1993, should I fail to prove compliance, and that if I had any questions I should call the MCLE Compliance Coordinator, Kahala Motoyama, and having called Ms. Motoyama several times without making contact, I wrote the State Bar, attention Ms. Motoyama, protesting that such suspension without a hearing was unconstitutional and questioning the constitutionality of the MCLE program. (Plfs Depo., Bar Ex. 1(a), sub #6.)

Fact No. 16: By letter dated July 23, 1993 (Plfs Depo., Bar Ex. 1(a), sub #8), copy to defendant Carole Rossi, defendant Lorna Maynard, Senior Administrative Assistant of the State Bar, wrote to me advising that my letter of July 9, 1993, had been referred to the State Bar's General Counsel to respond to my questions concerning the constitutionality of the MCLE program.

Fact No. 17: The Maynard letter of July 23, 1993, was the first and only direct reply, whether written or oral, I received to my letter of July 9, 1993, until after I was summarily suspended from the practice of law. (Plfs Depo., Bar Ex. 1(a), sub #7), had written to the State Bar, attention Lorna May-

nard on September 23, 1993 (Plfs Depo., Bar Ex. 1(a), sub #9), and had served my Claim of Damage dated October 7, 1993, on the State Bar, when I received a letter from defendant Carole Rossi dated October 22, 1993. (Plfs Depo., Bar Ex. 1(a), sub #10.)

Fact No. 18: At no time has the State Bar or any of its attorneys, officers, or administrators, whether orally, in writing, or in the course of the within action, made any statement to me, in substance or effect, that the MCLE program was constitutional or deny the truth of my several statements, supported by citations of authority, that the MCLE program and the action taken against me were unconstitutional.

Fact No. 19: On or about July 19, 1993, administrators of the MCLE program, without first affording me a hearing or opportunity to be heard, and against my will, "enrolled" me as an "inactive member" of the State Bar, and notified me of such suspension from the practice of law by form letter dated July 30, 1993. (Plfs Depo, Bar Ex. 1(a), sub #7.)

Fact No. 20. It is inferable, declarant infers, and the court should infer, from the facts and circumstances referred to in Nos. 15, 16, and 19, that administrators of the MCLE program caused me to be suspended from the practice of law while contemporaneously advising me that legal counsel for the State Bar would review my contentions concerning the unconstitutionality of the MCLE program and reply to me before such suspension was ordered.

Fact No. 21. It is inferable, declarant infers, and the court should infer, from the facts and circumstances referred to in Nos. 15, 16, 17, 18, and 19, that the State Bar,

at least prior to October 22, 1993, had not undertaken or reviewed any studies or legal analyses concerning the constitutionality of the MCLE program, else it would have been a simple matter for the State Bar to have responded to enquiries and contentions concerning the unconstitutionality of the MCLE program and my suspension from the practice of law by citing or referring me to such studies or legal analyses.

Fact No. 22. It is inferable, declarant infers, and the court should infer, from the facts and circumstances referred to in Nos. 15, 16, 17, 18, and 19, that the defendant State Bar has admitted that the MCLE program and the summary suspension of my right to practice law are unconstitutional.

Fact No. 23: At the same time the defendant State Bar suspended me from the practice of law in July, 1993, it also suspended some 412 other members of the State Bar for alleged failure to comply with the MCLE program. (State Bar answers to plaintiff's Interrogatories Nos. 3, 11, and 12.)

Fact No. 24: After enrolling me and approximately 412 other members of the State Bar whose rights to practice law had been summarily suspended during the month of July, 1993, the defendant State Bar caused notices of such suspensions to be sent to some 588 courts, agencies, and Bar Associations in California and other States. (State Bar answers to plaintiff's Interrogatories Nos. 3, 11, and 12.)

Fact No. 25: When the defendant State Bar caused the notices referred to in No. 24 above to be sent, it had no reason to believe that the courts, agencies, and bar associations to whom such notices were sent

would search their records to determine if each of the attorneys concerning whom such notices were sent were practicing law before such courts or agencies, or were members of such bar associations, or would consider enforcement action against the attorneys who were the subjects of such notices.

Fact No. 26: The sending of the notices referred to in No. 24 above caused unreasonable burdens and expenses to be imposed upon the courts and agencies, the tax payers supporting them, and the bar associations and their members, to whom such notices were sent, and the members of the State Bar of California whose annual dues were expended to meet the costs of such action.

Fact No. 27: (Judicial Notice.) The Rules and Regulations of the MCLE program do not contain any rule authorizing the State Bar to send the notices referred to in No. 24 above. (Admitted by State Bar's response to plaintiff's Request for Admission no. 41.)

Fact No. 28: When the defendant State Bar caused the sending of the notices to the courts referred to in No. 22 above, I represented clients who had active litigations pending before some of those courts.

Fact No. 29: The State Bar did not cause any inquiry to be made of pending litigations in in which plaintiff, and other members of the State Bar similarly situated, represented clients before causing the notices referred to in No. 22 above to be sent to the courts therein referenced. (Admitted by State Bar's response to plaintiff's Request for Admission no. 44.)

Fact No. 30: The State Bar did not cause any notices to be sent to clients of plaintiff, or to the clients of other members similarly

situated, to the effect that plaintiff, or such other similarly situated members, were not eligible to practice law before the courts in which plaintiff's, and such other similarly situated members', clients had litigations pending, or take any measure to give said clients opportunity to obtain other counsel. (Admitted by State Bar's response to plaintiff's Request for Admission no. 45.)

Fact No. 31: It is inferable, declarant infers, and the court should infer, that the administrators of the MCLE program who acted and omitted to act as referred to in Nos. 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 29, and 30, and each of them, were more interested in advancing their own employments than in protecting the public from members of the State Bar who were presumed by the MCLE program to be unlearned in the law.

Fact No. 32: It is inferable, declarant infers, and the court should infer, that the actions taken and omitted to be taken by the defendant State Bar referred to in Nos. 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 29, and 30, and each of them, were punitive in nature.

Fact No. 33: By causing me to be enrolled as an inactive member on July 19, 1993, the officers, agents and employees of the State Bar administering the MCLE program intended to prevent me from practicing my profession, and to compel me to comply with the MCLE program continuing education requirements. (Admitted by State Bar's response to plaintiff's Requests for Admission nos. 13 and 14.)

Fact No. 34: It is inferable, declarant infers, and the court should infer, that the actions taken and omitted to be taken by the defendant State Bar referred to in Nos. 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 29, and

30, and each of them, were intended to terrorize me, and other members of the State Bar similarly situated, into complying with the MCLE program.

Fact No. 35: It is inferable, declarant infers, and the court should infer, that the actions taken and omitted to be taken by the defendant State Bar referred to in Nos. 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 29, and 30, and each of them, were taken for the purpose of discouraging me, and other members of the State Bar similarly situated, from attempting to challenge the constitutionality of the MCLE program.

Fact No. 36: It is inferable, declarant infers, and the court should infer, that the actions taken by administrators of the State Bar and the MCLE program referred to in Nos. 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 29, and 30, and each of them, were taken under color of state law and deprived me of civil rights guaranteed by the Federal Constitution.

Fact No. 37: On October 13, 1993, I caused a duly executed Claim of Damage, dated October 7, 1993, to be filed with the State Bar, which claim was denied by the Board of Governors of the State Bar without affording me a hearing. (Exhibits I, J.)

Fact No. 39: (Judicial Notice.) Business & Professions Code Sec. 6070(a), enacted in 1989, in pertinent part, provides as follows: (Emphasis added to words and phrases which the State Bar failed to heed in suspending plaintiff.)
(a) The State Bar shall request the California Supreme Court to adopt a rule of court author authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar re-

quests the Supreme Court shall require that **within designated 36-month periods**, all active members of the State Bar shall complete at least **36 hours** of legal education activities approved by the State Bar of (sic) offered by a State Bar approved provider, with eight of those hours in legal ethics or law practice management, four hours of which shall be legal ethics. * * * A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member **pursuant to rules** adopted by the Board of Governors of the State Bar.

Fact No. 40: (Judicial Notice.) The MCLE program established and administered by the State Bar does not apply and is not applied to "all active" members of the State Bar. (Admitted by State Bar's response to plaintiff's Request for Admission no. 77.)

Fact No. 41: (Judicial Notice.) Business & Professions Code Sec. 6070(b), enacted in 1989, in pertinent part, provides as follows: [Emphasis added to words and phrases by which the Legislature created classes of members entitled to receive more favorable compliance requirements, or which the State Bar exceeded by extending more favorable compliance requirements to certain members of the State Bar, than were imposed upon plaintiff and others similarly situated.]

(b) For purposes of this section, **statewide associations of public agencies** and **incorporated, non-profit professional associations of attorneys**, shall be certified as approved providers upon completion of an appropriate application process to be established by the State Bar. The certification may be revoked only by a majority vote of the board, **after**

notice and hearing, and for good cause shown. Programs provided by the California District Attorneys Association or the California Public Defenders Association, or both, including but not limited to, programs provided pursuant to Title 1.5 (commencing with Section 11500) of Part 4 of the Penal Code, are deemed to be legal education activities approved by the State Bar or offered by a State Bar approved provider.

Fact No. 42: (Judicial Notice.) Business & Professions Code Sec. 6070(c), enacted in 1989, provides as follows: [Emphasis added to words and phrases by which the Legislature created, or which the State Bar exceeded, in granting complete exemption to classes and individual members of the State Bar from the MCLE program.]

(c) Notwithstanding the provisions of subdivision (a), retired judges, officers and elected officials of the State of California, and full-time professors at law schools accredited by the State Bar of California, the American Bar Association, or both, shall be exempt from the provisions of this section. Full-time employees of the State of California, acting within the scope of their employment, shall be exempt from the provisions of this section. Nothing in this section shall prohibit the State of California, or any political subdivision thereof, from establishing or maintaining its own continuing education requirements for its employees.

Fact No. 43: (Judicial Notice.) Active members of the State Bar who are retired judges of California courts are exempted from the requirements of the MCLE program by reason of Business and Professions Code Sec. 6070, even though they may practice law. (Admitted by State Bar's response to plaintiff's Request

for Admission no. 78.)

Fact No. 44: (Judicial Notice.) Being a retired judge does not, in itself, tend to show the current knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 45: (Judicial Notice.) There are no rational grounds for concluding a priori that active members of the State Bar who are retired judges, no matter how much legal knowledge such judges may have acquired during their tenure as judges, are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 46: (Judicial Notice.) Active members of the State Bar who are officers of the State of California, are exempted from the requirements of the MCLE program by reason of Business and Professions Code Sec. 6070, even though said members may practice law. (Admitted by State Bar's response to plaintiff's Request for Admission no. 81.)

Fact No. 47: (Judicial Notice.) Being elected to a particular office of the State of California by a member of the State Bar does not, in itself, tend to show the currency or knowledge of such a member in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 48: (Judicial Notice.) There are no rational grounds for concluding a priori

that the holding of an office of the State of California by a member of the State Bar, no matter how knowledgeable such member may be the arts of politics or such member's own particular area of governance, makes such a member of the State Bar more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 49: (Judicial Notice.) Active members of the State Bar who are full time professors at law schools accredited by the State Bar are exempted from the requirements of the MCLE program by reason of Business and Professions Code Sec. 6070, even though said members may practice law.

Fact No. 50: (Judicial Notice.) Accreditation of a particular law school by the State Bar does not, in itself, establish the currency or knowledge of a particular professor of that law school in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 51: (Judicial Notice.) Being a full time professor of a law school accredited by the State Bar does not, in itself, tend to show the current knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 52: (Judicial Notice.) There are no rational grounds for concluding a priori that active members of the State Bar who are full time professors of law schools accredited by by the State Bar, no matter how knowledgeable

they may be in the subject matter of their teachings, are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 53: (Judicial Notice.) Active members of the State Bar who are full time professors at law schools accredited by the American Bar Association are exempted from the requirements of the MCLE program by reason of Business and Professions Code Sec. 6070, even though said members may practice law.

Fact No. 54: (Judicial Notice.) The American Bar Association is a private association of attorneys over which the California State Bar has no authority or control.

Fact No. 55: (Judicial Notice.) Accreditation of a particular law school by the American Bar Association does not, in itself, tend to show the currency or knowledge of a particular professor of that law school in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 56: (Judicial Notice.) Being a full time professor of a law school accredited by the American Bar Association does not, in itself, tend to show the current knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 57: (Judicial Notice.) There are no rational grounds for concluding a priori that active members of the State Bar who are

full time professors of law schools accredited by the American Bar Association, no matter how knowledgeable they may be in the subject matter of their teachings, are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 58: (Judicial Notice.) Active members of the State Bar who are full-time employees of the State of California are exempted from the requirements of the MCLE program by reason of Business and Professions Code Sec. 6070, even though they may practice law.

Fact No. 59: (Judicial Notice.) Being a full-time employee of the State of California does not, in itself, tend to show the current knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 60: (Judicial Notice.) There are no rational grounds for concluding a priori that active members of the State Bar who are full-time employees of the State of California, are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 61: (Judicial Notice.) No individual exemptions or classes of exemption from the requirements of the MCLE program other than those set forth in Business and Professions Code Sec. 6070 are authorized by the Legislature of the State of California.

Fact No. 62: (Judicial Notice.) California

Rule of Court 958, adopted by the Supreme Court on December 6, 1990, provides as follows: [Emphasis added to words and phrases by which this Rule granted complete exemption to classes and individual members of the State Bar in excess of the exceptions granted by Bus. & Prof. Code sec. 6070, or which the State Bar exceeded in promulgating the MCLE Rules.]

(a) This rule is adopted under section 6070 of the Business and Professions Code.

(b) The State Bar shall establish and administer a minimum continuing legal education program, beginning on or after January 1, 1991, under rules adopted by the Board of Governors of the State Bar. These rules may provide for carry forward of excess credit hours, **staggering of the educational requirement** for implementation purposes, and retroactive credit for legal education approved by the State Bar or offered by a State Bar approved provider completed prior to the effective date of the program.

(c) Each active member of the State Bar (1) not exempt under Business and Professions Code section 6070, (2) not a **full-time employee of the United States Government**, its departments, agencies, and public corporations, acting within the scope of his or her employment, and (3) not **otherwise exempt under rules adopted by the Board of Governors** of the State Bar, shall, **within 36-month periods** designated by the State Bar, complete at least 36 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Eight of those hours shall address legal ethics or law practice management, four hours of which shall be in legal ethics. Members may be required to complete legal education in other specified areas within the 36-hour requirement under rules adopted by the State Bar. Each active member shall

report his or her compliance to the State Bar under rules adopted by the Board of Governors of the State Bar.
(d) A member of the State Bar who fails to satisfy the requirements of the State Bar's minimum continuing legal education program shall be enrolled as an inactive member of the State Bar under rules adopted by the Board of Governors of the State Bar.
(e) The State Bar shall have the authority to set and collect appropriate fees and penalties.

Fact No. 63: (Judicial Notice.) Rule of Court 958 purports to grant exemptions to members of the State Bar in addition to those exemptions granted by Bus. & Prof. Code sec. 6070.

Fact No. 64: (Judicial Notice.) Active members of the State Bar who are full-time employees of the United States Government are exempted from the requirements of the MCLE program by reason of California Rules of Court no. 958, even though they may practice law.

Fact No. 65: (Judicial Notice.) Being a full-time employee of the United States Government does not, in itself, tend to show the current knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 66: (Judicial Notice.) There are no rational grounds for concluding a priori that active members of the State Bar who are full-time employees of the United States Government are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 68: (Judicial Notice.) Rule 6 of the MCLE Rules and Regulations, purports to provide for the exemption of members of the State Bar in addition to those exemptions specifically granted by Bus. & Prof. sec. 6070 or Rule 958. Thus, Rule 6, in pertinent part, provides as follows:

6.0 SPECIAL CASES AND EXEMPTIONS
6.1 Prescribed Exemptions
In accordance with Business and Professions Code section 6070 and California Rule of Court 958, the following are exempt from the continuing legal education requirements:

* * *

6.1.4. Full-time employees of the State of California acting within the scope of their employment. For the purposes of this section, "full-time employees of the State of California acting within the scope of their employment" shall refer to members employed by the State of California as attorneys or Administrative Law Judges on a permanent or probationary basis, regardless of their working hours, who do not practice law in California except as employees of the State of California; and

6.1.5. Full-time employees of the United States Government, its departments, agencies, and public corporations, acting within the scope of their employment. For the purposes of this section, "full-time employees of the United States Government, its departments, agencies, and public corporations, acting within the scope of their employment" shall refer to members employed by the United States Government, its departments, agencies, and public corporations, as attorneys or Administrative Law Judges on a permanent or probationary basis, regardless of their working hours, who do not practice law in California except as employees of the Government of the United States, its departments, agencies,

and public corporations.

6.2. Good Cause Exemption From or Modification of Requirement

A member may file a written request setting forth good cause for an exemption from compliance with or modification of any of the requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Continuing Legal Education.

Fact No. 69: (Judicial Notice.) Rule 6.2.1. of the MCLE Rules and Regulations purports to grant members who have requested and denied exemption, due process of law rights not afforded other members who have been suspended from the practice of law by reason of their alleged failure to comply with the MCLE educational requirements. Thus, Rule 6.2.1. provides as follows: Should the decision be adverse to the member, the member may appeal such decision pursuant to the provisions of California Rule of Court 952(c).

Fact No. 70: (Judicial Notice.) Members of the State Bar who are attorneys or Administrative Law Judges employed by the State of California are exempted from the requirements of the MCLE program by Rule 6.1.4 of the MCLE Rules and Regulations, even though they may practice law. (Admitted as to Administrative Law Judges by State Bar's response to plaintiff's Request for Admission no. 96.)

Fact No. 71: (Judicial Notice.) There are no rational grounds for concluding that members of the State Bar who are attorneys or Administrative Law Judges employed by the State of California, no matter how knowledgeable they may be in their own respective areas of specialized practice, are more current or knowledgeable in the special subjects of legal

ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 72: (Judicial Notice.) Guidelines promulgated by a Committee of the State Bar set forth "advisory interpretations" of the MCLE Rules and Regulations, which purport to authorize the State Bar to grant additional exemptions to the mandatory educational requirements than those expressly granted by Bus. & Prof. Code sec. 6070, California Rule of Court 959, or the MCLE Rules and Regulations.

Fact No. 73: (Judicial Notice.) Members of the State Bar who are retired judges of courts other than the courts of the State of California, are exempted from the requirements of the MCLE program by a "guideline" issued by a committee of the State Bar which guideline is said committee's interpretation of Rule 6.1.1 of the MCLE Rules, even though such members may practice law. (Admitted by State Bar's response to plaintiff's Request for Admission no. 98.)

Fact No. 74: (Judicial Notice.) The "interpretation" granting exemption from the mandatory educational requirements of the MCLE program is not expressly authorized by either the Legislature or the Supreme Court of the State of California.

Fact No. 75: (Judicial Notice.) Being a member of the State Bar who is a retired judge whose judicial service was with a court or courts other than the California courts, does not, in itself, tend to show the currency or knowledge of such a member of the State Bar in the special subjects of legal ethics and law practice management, or the general subjects addressed by MCLE approved providers.

Fact No. 76: (Judicial Notice.) There are no rational grounds for concluding that active members of the State Bar who are retired judges whose judicial services were with a court or courts other than the California courts, no matter how much legal knowledge such judges may have acquired during their tenure as judges, are more current or knowledgeable in the special subjects of legal ethics and law practice management, or the various general subjects addressed by State Bar approved providers, than any other member of the State Bar.

Fact No. 77: (Judicial Notice.) Rule 6.2 of the MCLE Rules and Regulations purports to authorize administrators of the MCLE program to grant exemptions to individual members of the State Bar on a showing of "good cause", thereby creating a classification for exemption which is not authorized by either Bus. & Prof. Code sec. 6070 or California Rule of Court 958.

Fact No. 78: (Judicial Notice.) Neither Bus. & Prof. Code sec. 6070, California Rule of Court 958, nor the MCLE Rules and Regulations include or incorporate by reference any standards for determining what constitutes "good cause" for the exemptions referred to in Rule 6.2. (Admitted as to MCLE Rules and Regulations by State Bar's response to plaintiff's Request for Admission no. 104.)

Fact No. 79: (Judicial Notice.) Members of the State Bar who are exempted from the requirements of the MCLE program, whether by act of the Legislature of the State of California or the Rules of the MCLE program or grant by administrators of the MCLE program, program, or otherwise, may lawfully prepare and interpret legal documents, give advice

or take legal action which directly or indirectly affects the general public and/or persons whose economic or personal rights and interests are subject to State action, deal with and/or oppose other members of the State Bar in matters affecting the interests of such other members and their clients, and appear before the courts of the State of California in positions adverse to the interests of clients of other members of the State Bar.

Fact No. 80: Rules 6.0, 6.1, 6.1.1, 6.1.2, 6.1.3, 6.1.4, 6.1.5, and 6.2, of the MCLE Rules, provide that members of the State Bar who are also members of certain named classes of persons entitled to practice law in California are exempt from the continuing legal education requirements of the MCLE program. (Admitted by State Bar's response to plaintiff's Request for Admission no. 107.)

Fact No. 81: Rule 6.0 and its subparts exempts from the continuing legal education requirements of the MCLE program members of the State Bar who may give legal advice, prepare legal documents, appear before the courts of California, and otherwise engage in both general and specialized legal practice. (Admitted by State Bar's response to plaintiff's Request for Admission no. 108.)

Fact No. 82: Those members of the State Bar who are exempt from the continuing legal education requirements of the MCLE program by reason of Rule 6.0, including its applicable subparts, may engage in the practice of law in competition with those members of the State Bar who are not exempt from such requirements.

Fact No. 83. Plaintiff, and other members of the State Bar who similarly are not members of the classes exempted from the con-

tinuing legal education requirements of the MCLE program by Rule 6.0 and its subparts, are disfavored over the members of the State Bar who are exempted by Rule 6.0 and its subparts.

Fact No. 84. The State Bar has not prepared or considered any studies determining whether members of the State Bar who are exempted from compliance with the educational requirements of the MCLE program are more competent, knowledgeable, or current in legal ethics, office management, the law, or the obligations and standards of the profession, than members of the State Bar who are not exempted from compliance with the educational requirements of the MCLE program. (Admitted by State Bar's response to plaintiff's Request for Admission no. 111.)

Fact No. 85: (Judicial Notice.) The ostensible purpose of the MCLE program, as declared by Rule 1.0 of the MCLE Rules and Regulations, is to assure that active members of the State Bar remain current regarding the law, the obligations and standards of the profession, and the management of their practices.

Fact No. 86: The ostensible purpose of the MCLE program, as declared by the President of the State Bar announcing its commencement, was to improve the competence of lawyers to the benefit of the public. (Admitted by State Bar's response to plaintiff's Request for Admission no. 114.)

Fact No. 87: The MCLE program does not require or provide for the testing of members of the State Bar in the process of complying with the educational requirements of the MCLE program to determine whether or not such members are achieving, whether by self-study or participation in provider or other programs approved

by MCLE program administrators, any improvement in their competency or currency in their knowledge of legal ethics, office management, the law in general, or the obligations or standards of the profession. (Admitted by State Bar's response to plaintiff's Request for Admission no. 116.)

Fact No. 88: The State Bar has not prepared or reviewed any studies determining whether members of the State Bar in compliance with the educational requirements of the MCLE program to determine whether or not such members have achieved, whether by self-study or participation in provider programs approved by MCLE program administrators, any improvement in their competency or are current in their knowledge of legal ethics, office management, the law in general, or the obligations or standards of the profession. (Admitted by State Bar's response to plaintiff's Request for Admission no. 117.)

Fact No. 89: (Judicial Notice.) Rule 6.0 and its several subparts of the MCLE Rules, as written and interpreted by the State Bar, violates the Equal Protection clause of the Constitution of the United States.

Fact No. 90: (Judicial Notice.) Rule 6.0 and its several subparts of the MCLE Rules, as applied to plaintiff and all other members similarly situated, violates the Equal Protection clause of the Constitution of the United States.

Fact No. 91: (Judicial Notice.) Rule 6.0 and its several subparts of the MCLE Rules, as written and interpreted by the State Bar, violates the Equal Protection clause of the Constitution of the State of California.

Fact No. 92: (Judicial Notice.) Rule 6.0,

and its several subparts of the MCLE Rules, as applied to plaintiff and all other members similarly situated, violates the Equal Protection clause of the Constitution of the State of California.

Fact No. 93: (Judicial Notice.) The Legislature of the State of California, by enactment of Section 6070 of the Business and Professions Code, directed that the authorized mandatory continuing legal education program require that all active members of the State Bar shall, "within designated 36 month periods", complete at least 36 hours of legal education activities", and that a member who fails to satisfy such requirements "shall be enrolled as an inactive member". (Admitted by State Bar's response to to plaintiff's Request for Admission no. 122.)

Fact No. 94: (Judicial Notice.) The MCLE program, as written by the State Bar and applied to plaintiff and other members whose last names begin with the letters N through Z, requires that during the initial compliance period beginning February 1, 1992, such members complete at least 12 hours of legal education activities within a designated 12 month period, and that members of the State Bar, including plaintiff, who fail to satisfy such requirements, be enrolled as inactive members. (Admitted by State Bar's response to plaintiff's Request for Admission no. 123.)

Fact No. 95: (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, in substance and effect, provide that members whose last names commence with the letters N through Z, must prove compliance by January 31, 1993, that members whose last names commence with the letters H through M, have until January 31, 1994, to prove compliance, and that members whose last names commence with

the letters A through G, have until January 31, 1995, to prove compliance. (Admitted by State Bar's response to plaintiff's Request for Admission no. 125.)

Fact No. 96: (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, in substance and effect, provide that members whose last names commence with the letters N through Z, i.e., plaintiff's group, who must prove compliance by January 31, 1993, are disfavored over members whose last names commence with the letters H through M, who have until January 31, 1994, to prove compliance in that the latter group have one more year within which to establish compliance and thus one more year within which they can practice law than plaintiff and others similarly situated before complying or ceasing the practice of law.

Fact No. 97. (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, in substance and effect, provide that members members whose last names commence with the letters N through Z, i.e., plaintiff's group, who must prove compliance by January 31, 1993, are disfavored over members whose last names commence with the letters A through G, who have until January 31, 1995, in that members of this latter group have two more years within which to establish compliance and thus two more years within which they can practice law than plaintiff and others similarly situated before complying or ceasing the practice of law.

Fact No. 98: (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, as written, violate the Equal Protection clause of the United States Constitution.

Fact No. 99: (Judicial Notice.) Rules 3.0,

3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, as applied to plaintiff and all other members similarly situated, violate the Due Process clause of the United States Constitution.

Fact No. 100: (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, as written, violate the Equal Protection clause of the Constitution of the State of California.

Fact No. 101: (Judicial Notice.) Rules 3.0, 3.1, 3.2, 3.3, and 3.4, of the MCLE Rules, as applied to plaintiff and all other members similarly situated, violate the Due Process clause of the Constitution of the State of California.

Fact No. 102: The educational requirements of the MCLE program, to the extent that they apply to members of the State Bar who are not exempt from complying with such requirements, are not uniform in either their subject matter, referred to by the Rules as "activity", or their content. (Admitted by State Bar's Response to plaintiff's Requests for Admission Nos. 134 and 135.)

Fact No. 103: All members of the State Bar who must comply with the educational requirements of the MCLE program are not required to participate in programs, with the exception of programs whose subject matters are legal ethics, law management practice, prevention, detection, and treatment of substance abuse and emotional distress, and elimination of bias, which all have the same subject matter. (Admitted by State Bar's response to plaintiff's Request for Admission no. 134.)

Fact No. 104: The programs approved by the MCLE program dealing with the same subject matter are not uniform in their content.

(Admitted by State Bar's response to plaintiff's Request for Admission no. 135.)

Fact No. 105: (Judicial Notice.) Classifications of members of the State Bar, whether by the Board of Governors of the State Bar, the California Supreme Court, or the Legislature of the State of California, which provide unequal treatment of members engaged in the same or substantially the same type of business activity, violate the Equal Protection clauses of both the Federal and State Constitutions.

Fact No. 106. (Judicial Notice.) A classification of members of the State Bar, whether by the Board of Governors of the State Bar, the California Supreme Court, or the Legislature of the State of California, which infringes on a member's right to practice law, must be closely scrutinized by the courts and may be upheld only if it is necessary for the furtherance of a compelling state interest.

Fact No. 107: Administrators of the MCLE program enrolled plaintiff as an inactive member of the State Bar without first affording him a hearing. (Admitted by State Bar's response to plaintiff's Request for Admission no. 138.)

Fact No. 108: (Judicial Notice.) Rule 14.1 provides that enrollment of a member of the State Bar as an inactive member for failure to comply with MCLE educational requirements may be done by the Board of Governors, or by an officer of the State Bar, or by the designee of an officer of the State Bar.

Fact No. 109: (Judicial Notice.) Rule 14.1 is an unlawful delegation of authority invested in the Supreme Court of the State of

California.

Fact No. 110: (Judicial Notice.) Rule 14.2 purports to establish that enrollment of a member of the State Bar as an inactive member pursuant to the MCLE Rules is "administrative in nature and no hearing is required". (Admitted by State Bar's response to plaintiff's Request for Admission no. 138.)

Fact No. 111: (Judicial Notice.) By its enactment in 1989 of Sec. 6070 of the Business and Professions Code, the Legislature of the State of California directed that enrollment of a member of the State Bar as an inactive member for failure to comply with the mandatory continuing legal education requirements should be pursuant to rules adopted by the Board of Governors of the State Bar.

Fact No. 112. (Judicial Notice.) By its adoption in 1990 of Rule 958, the California Supreme Court directed that enrollment of a member of the State Bar as an inactive member for failure to comply with the minimum continuing legal education requirements should be pursuant to rules adopted by the Board of Governors of the State Bar. (Admitted by State Bar's response to plaintiff's Request for Admission no. 142.)

Fact No. 113: (Judicial Notice.) Other than promulgating Rule 14.0 and its subparts, which set forth no rules which afford a member the right to a hearing, the State Bar promulgated no special rules setting forth procedures for enrolling a member of the State Bar as an inactive member for failure to comply with MCLE requirements.

Fact No. 114: (Judicial Notice.) Sec. 6007 of the Business and Professions Code provides for hearings for members of the State

Bar whose conduct posed "a substantial threat of harm to the attorney's clients or the public" before such members may be suspended from the practice of law, but there are no rules which provide for hearings for members of the State Bar who have failed to comply with the MCLE program before such members are suspended from the practice of law.

Fact No. 115: (Judicial Notice.) The action of the State Bar in affording members of the State Bar who failed to comply with the requirements of the MCLE program less due process of law than it affords to members of the State Bar whose conduct poses a substantial threat of harm to the attorney's clients or the public, is arbitrary and capricious.

Fact No. 116: (Judicial Notice.) Statutes enacted by the California State Legislature, Rules adopted by the California Supreme Court, or Rules adopted by the State Bar, which deny a member of the State Bar due process of law are unconstitutional under both the Federal and State Constitutions.

Fact No. 117: (Judicial Notice.) Actions taken by the Board of Governors of the State Bar, officers of the State Bar, administrators of the State Bar, or administrators of the MCLE program, which deny a member of the State Bar due process of law are unconstitutional under both the Federal and State Constitutions.

Fact No. 118: (Judicial Notice.) The right of a member of the State Bar to practice his profession is a property right which cannot be taken from such member without due process of law.

Fact No. 119: (Judicial Notice.) The Board of Governors of the State Bar, officers of

the State Bar, administrators of the State Bar, and administrators of the MCLE program are fiduciaries of plaintiff and all other members of the State Bar.

Fact No. 120: (Judicial Notice.) The Board of Governors of the State Bar, officers of the State Bar, administrators of the State Bar, and administrators of the MCLE program have a duty to act fairly toward and in good faith with plaintiff and all other members of the State Bar. (Admitted by State Bar's response to plaintiff's Request for Admission no. 154.)

Fact No. 121: (Judicial Notice.) In enrolling plaintiff, and all other members of the State Bar similarly situated, as inactive members of the State Bar, the Board of Governors of the State Bar, officers of the State Bar, administrators of the State Bar, and/or administrators of the MCLE program so acting, acted under color of state law.

Fact No. 122: (Judicial Notice.) The State Bar's enrollment of plaintiff, and all other members of the State Bar similarly situated, situated, as inactive members for failure to comply with the requirements of the MCLE program was contrary to the Due Process clauses of both the Federal and State Constitutions.

Fact No. 123: As a consequence of the State Bar's sending of the notices of suspension referred to in Facts Nos. 24 and 27, which notices were sent on a form which included notices that certain other attorneys had been disbarred or otherwise disciplined, the United States District Court for the Northern District of California ordered plaintiff to show cause why he should not be barred from practice before that court.

Fact No. 124: In the course of the "show cause" hearing referred to in Fact No. 124, the Federal judge presiding referred to plaintiff as a "disbarred" attorney, and refused to consider the merits of plaintiffs' showing in which plaintiff had particularized his contentions that the MCLE program and his suspension by the State Bar violated the Due Process and Equal Protection clauses of the United States Constitution.

Fact No. 125: At the time the Federal judge referred to plaintiff as a "disbarred" attorney, as referred to in Fact No. 124, the courtroom contained numerous other attorneys waiting to have their matters heard, and the judge's reference to plaintiff as a "disbarred" attorney caused plaintiff great humiliation and embarrassment, and so confused him as to substantially inhibit his ability to effectively plead his cause.

Fact No. 126: Colin Wong, an Assistant General Counsel for the State Bar, having the same rank and title as the defendant Carole Rossi, has admitted to declarant that he is required to comply with the MCLE program's educational requirements, that is to say, that he is not exempt from MCLE under the governmental employee or any other category of exemption, from which fact it is inferable that the defendant Carole Rossi is not a governmental employee.

Fact No. 127: On July 16, 1993, defendant Lorna Maynard discussed plaintiff's letter of July 9, 1993, with her superior, Phyllis Culp, Director, Legal Unit, Office of Certification, and on that same day, July 16th, **telefaxed** plaintiff's letter of July 9th to defendant Carole Rossi. (Defendant Maynard's answers to Plaintiff's Special Interrogatories, Nos. 11 and 12.)

Fact No. 128: Defendant Lorna Maynard has refused to answer plaintiff's Special Interrogatory No. 14, seeking disclosure of the contents of the discussion referred to in Fact No. 127. (Defendant Maynard's response to plaintiff's Special Interrogatory No. 14.)

Fact No. 129: Defendant Lorna Maynard did not have a conversation with any person in the Office of General Counsel concerning plaintiff's letter of July 9, 1993, prior to sending said letter to defendant Carole Rossi. (Defendant Maynard's answers to plaintiff's Special Interrogatory Nos. 15, 16.)

Fact No. 130: It is inferable, plaintiff so infers, and the court should infer, from Facts Nos. 127, 128, and 129, that Lorna Maynard's superior, Phyllis Culp, on July 16, 1993, had a conversation with the defendant Carole Rossi concerning plaintiff's letter of July 9, 1993.

Fact No. 131: It is inferable, plaintiff so infers, and the court should infer, from Facts Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 127, 128, and 129, and 130, that defendant Carole Rossi knew that plaintiff's contentions concerning the unconstitutionality of the MCLE program were well founded, and delayed reply to plaintiff's letter of July 9, 1993, until October 22, 1993, so as to allow the suspension proceedings involving plaintiff and some 412 other members of the State Bar similarly situated, to proceed to suspension by the Board and the subsequent notices of suspension to the 588 courts, agencies, and bar associations, as a result of which such economic pressures would be exerted upon plaintiff as would compel him to abandon his contentions of unconstitutionality.

Fact No. 132: It is inferable, plaintiff infers, and the court should infer, from Facts Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 39, 30, 31, 32, 33, 34, 35, 127, 128, 129, 130, and 131, that Phyllis Culp, and the defendants Lorna Maynard and Carole Rossi, on and after July 16, 1993, planned to delay acknowledgment that plaintiff's letter of July 9, 1993, had been received by the State Bar, and had been referred to the defendant Rossi on July 23, 1993, the date of Maynard's letter to plaintiff acknowledging receipt of plaintiff's letter of July 9, 1993, so as to make it appear that plaintiff's suspension by the Board of Governors had occurred before defendants had opportunity to consider plaintiff's contentions.

Fact No. 133: It is inferable, and plaintiff so infers, and the court should infer, from Facts Nos. 15, 16, 17, 18, 19, 20, 21, 22, 24, 27, 28, 39, 30, 31, 32, 33, 34, 35, 127, 128, 129, 130, 131 and 132, that Phyllis Culp, and defendants Lorna Maynard and Carole Rossi, and possibly other MCLE State Bar employees, realized that if plaintiff persisted in pressing his claims that the MCLE program was unconstitutional, their employments would be in jeopardy, and so planned and acted as to allow or cause plaintiff to be suspended from the practice of law, and the notices of his suspension to be broadcast to the courts, agencies, and bar associations of the United States, so as to inflict great economic hardship upon plaintiff and thereby discourage him from pressing his claims of unconstitutionality, to the protection of their employments and personal interests.

Fact No. 134: Plaintiff did not request being enrolled as an inactive member of the

State Bar and made timely objection to his involuntary enrollment as an inactive member.

Fact No. 135: The defendant State Bar did not enroll plaintiff as an inactive member of the State Bar pursuant to the provisions and procedures of Bus. & Prof. Code sec. 6007 or any of its subparts.

Fact No. 136: In enrolling plaintiff as an inactive member of the State Bar, defendant State Bar and its individual officers and employees so acting, acted ultra vires and are liable for all damages suffered by plaintiff as a consequence of such enrollment.

Fact No. 137: Assuming that a member charges his clients for his services at an hourly rate of $150/hr, which is what plaintiff charged in 1992-93 and which is probably somewhat less than the average rate for California attorneys, that his compliance program is 1/2 by self-study and 1/2 by attending seminars by professional providers, and that the average provider fee is $200 per 3 hour session, and that two hours of travel time are required to come and go from each 3 hour session, declarant estimates that the average member's cost to comply with the MCLE program is approximately $7,500 for each 12 hours of MCLE compliance, an expense which must be borne by the member in the form of reduced leisure or work time, and, one way or another, passed on to his clients in the form of increased fees and/or diminished service.

Fact No. 138: Plaintiff believed that he had a period of three years, as provided by Bus. & Prof. Code sec. 6070 and Rule of Court 958, within which to either comply with the educational requirements of the MCLE program or retire. However, the compliance groups set

up by MCLE Rule 3, contrary to the mandates of the Legislature and the Supreme Court that active members shall have a period of 36 months within which to prove compliance or suffer suspension disfavors plaintiff and other members similarly situated by reason of their names, favors other members, who, by reason of their names have either 24 months or 36 months within which to prove compliance, and substantially damaged plaintiff and other active members approaching retirement age by denying them the opportunity to practice law for periods of one and two years during which compliance was not required of the more favored members.

Fact No. 139: As a consequence of the notice referred to in No. 24 above, the Chief Judge of the United States District Court of the Northern District of California issued an order to plaintiff to show cause why he should not be barred from the practice of the law before said Court.

Fact No. 140: Plaintiff responded to the "show cause" order referred to in No. 139 above by filing a written declaration setting forth facts and case authority showing that the MCLE program, as written and as applied to him, was violative of the Equal Protection and Due Process clauses of the United States Constitution.

Fact No. 141: In the course of the "show cause" hearing referred to in Nos. 139 and 140 above, the United States District Court judge assigned to hear the matter, referred to plaintiff as a "disbarred attorney".

Fact No. 142: At the time the judge referred to in No. 141 referred to plaintiff as a "disbarred attorney", the courtroom was occupied by numerous attorneys waiting for their resp-

ective cases to be heard, and the court's reference in such company caused plaintiff great humiliation and embarrassment.

CONDITIONAL REQUEST FOR CONTINUANCE TO OBTAIN DISCOVERY

Plaintiff believes that he has made a presentation in opposition to defendants' motions to warrant their denial out of hand. However, in the event the court is not so disposed, plaintiff requests an extended continuance of these motions sufficient in duration to allow him to present motions to compel further responses to interrogatories by the State Bar, Maynard and Rossi, and for further production of documents already requested of the State Bar.

The State Bar has refused to produce its budget figures for requested years prior to 1991 or to disclose the costs of MCLE. This data is required to show the court that MCLE is an expensive boon-doggle and to support plaintiff's contentions that defendants deceived him in the matter of the July 16-23, 1993, events and brought about his suspension for purposes of personal gain.

Defendants have also refused to disclose communications between defendants and the Board of Governors and between each other concerning plaintiff's inquiries concerning constitutionality and the events of July 16-23, 1993, and Rossi's reply to plaintiff of October 22, 1993. This information is necessary to show the nature and extent of the conspiracy to dissuade plaintiff from pressing his constitutional objections, and to assist in establishing liability for "bad faith", fraudulent conspiracy, Civil Rights Act violations, and punitive damages.

The requested information is entirely within defendants' control and plaintiff has no means of obtaining it except through

the requested discovery. Depending on the content and candor of defendants' further responses, plaintiff will want to take the depositions of Maynard, Rossi, and Culp, as well as other knowledgeable State Bar personnel. Based upon his past experiences in this case and the nature of the information plaintiff seeks, which promises to be most destructive of the Bar's position, plaintiff believes that a period of 6 months will be required to accomplish these ends.

WHEREFORE, plaintiff prays that defendants' motions for summary judgment and summary adjudication of issues be denied, or, in the alternative, that opportunity for discovery be afforded pursuant to CCP 437c(h).

Executed under penalty of perjury on August 13, 1995, at San Diego, California.

_____

Lew Warden, Plaintiff.

APPENDIX K

APPELLANT'S OPENING BRIEF
CALIFORNIA COURT OF APPEAL
(Filed April 2, 1996)
(Title page omitted)

TABLE OF CONTENTS
(Elements omitted)

A. Appellant's Right to Practice Law Was a Vested Fundamental Right, a Right Which Controls Judicial Determination of the Constitutional Issues of Substantive and Procedural Due Process of Law and Equal Protection of the Laws Determinations.

B. The State Bar's Summary Suspension of Appellant's Right to Practice Law, Without First Affording Him a Hearing, Violated Due Process of Law.

C. The State Bar's Suspension of Appellant Without Prior Hearing Was Not Authorized by Either the Legislature or the Supreme Court.

D. The State Bar's MCLE Program Violates the Equal Protection Clauses of the Federal and State Constitutions.

* * *

F. Respondents Are Liable to Appellant Under the Federal Civil Rights Acts.

* * *

APPENDIX L

APPELLANT'S CLOSING BRIEF
CALIFORNIA COURT OF APPEAL
(Filed May 16, 1996)
(Title page omitted)

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(Elements omitted)

APPELLANT'S RESPONSES TO RESPONDENTS' DUE PROCESS CONTENTIONS

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B. Due Process Procedures Are Essential Not Only to Protect the Individual Attorney, But Also to Protect the Clients and the Public.

C. A Due Process Hearing is Required to Protect the Right of Appellate Review.

D. The State Bar May Not Compel Compliance With an Unconstitutional Program as a Condition for Continuing the Right to Practice Law.

E. Appellant's Right to Practice Law Could Not Be Suspended Without a Prior Due Process Hearing.

F. Respondents' Contention That Appellant Had Adequate Notice of the Proposed Suspension and That Therefore a Hearing Was Not Required Is a Nonsequitur.

APPELLANT'S RESPONSE TO RESPONDENTS' EQUAL PROTECTION CONTENTIONS

A. The Right to Pursue One's Established

Profession Is a Fundamental Right for the Purpose of Invoking Strict Scrutiny Under the Equal Protection Clause.

B. Respondents Failed to Make Any Factual Showing in the Trial Court in Support of its Contentions That MCLE's Several Discriminations Serve Legitimate State Purposes, and Now Fail to Make Such Showings to This Court.

APPELLANT'S RESPONSE TO OTHER CONTENTIONS BY RESPONDENTS

A. Respondents Fail to Make Any Attempt Whatsoever to Justify the Unauthorized Methods by Which They Sought to Force Compliance on Appellant and Other Members of the State Bar.

B. Respondents Are Not Immune From Federal Civil Rights Acts or State Fraud Liability.

C. Ample Unanswered Evidence Was Produced to Establish Fraud and Deceit on the Part of the Individual Respondents and Resulting Damage to Appellant.

* * *

APPENDIX M

APPELLANT'S PETITION FOR REHEARING
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(Filed March 6, 1997)
(Title page omitted)

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(Elements omitted)

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B. The Court Errs in Concluding That The Due Process Issues Are Moot Because of Its Disposition of The Equal Protection Issues.

* * *

C. The Court Errs in Concluding That Appellant is Not Entitled to Recover Damages Under the Federal Civil Rights Acts For Deprivation of His Constitutional Rights to Equal Protection and Due Process of Law.

D. The Court Errs in Concluding That There Is No Fundamental Right to Continue to Engage in an Established Occupation, in This Case The Practice of Law.

E. The Court Errs in Concluding That Th State Bar and The Individual Defendants Are Immune From Liability For Their Misconduct Shown by The Facts of This Case.

* * *

APPENDIX N

APPELLANT'S PETITION FOR REVIEW
CALIFORNIA SUPREME COURT
(Filed April 17, 1997)
(Title page omitted)

TABLE OF CONTENTS
(Elements omitted)

A. The Court of Appeal Omitted to Make Appropriate Reference to the Facts Upon Which the Due Process and Damages Issues Presented by This Appeal Rest.

1. Denials of due process of law were practiced upon appellant and numerous other attorneys similarly situated.

2. Additional due process violations were practiced upon appellant by fraud and deceit.

B. The State Bar's Suspension of Appellant's Right to Practice Law, Especially Without First Affording Him a Hearing, Violated Due Process of Law.

C. Appellant Has Both Pleaded and Produced Sufficient Facts to Prove a Cause of Action for Damages Under the Federal Civil Rights Acts and in Tort.

D. The Court of Appeal Erred in Concluding That The Due Process Issues Are Moot Because of Its Disposition of The Equal Protection Issues.

* * *

E. The Court of Appeal Erred in Its Conclusion That The State Bar and The Individual Respondents Are Immune From Liability

For Their Misconduct Shown by The Facts of This Case.

* * *

APPENDIX O

APPELLANT'S REPLY BRIEF
CALIFORNIA SUPREME COURT
(Filed August 19, 1997)
(Title page omitted)

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(Elements omitted)

III. STATEMENT OF FACTS

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IV. ARGUMENT

A. This Court Has Plenary Authority to Strictly Scrutinize MCLE For Compliance With State and Federal Standards For Equal Protection, Substantive and Procedural Due Process, And Also for Purpose, Necessity, Reasonableness, Efficiency, or Economy.

1. In the event the Court finds the MCLE program unconstitutional in any particular, it should remand the program to the State Bar for further study and in-put by the membership.

2. Appellant makes no contention that an appropriate CLE program would not serve a legitimate public purpose, but does sincerely believe that the present program, independently of the constitutional issues, should be seriously

reconsidered.

3. Appellant and respondents agree that the Legislature did not mandate MCLE; it merely directed the State Bar to "request" this Court to adopt a rule authorizing the State Bar to create and administer a mandatory CLE program.

4. The power to regulate the practice of law in California reposes exclusively in the California Supreme Court.

5. This Court's plenary authority to regulate the practice of law moots the State Bar's contention that the Court of Appeal erred in its application of the "rational basis" test.

B. The Court of Appeal Correctly Concluded that Bus. & Prof. C. sec. 6070, Rule 958, and MCLE Invidiously Discriminate Against Appellant and Other California Lawyers by Exempting Numerous Classes of Attorneys Who Also Practice Law in California, and Thereby Violate the Equal Protection Clauses of the State and Federal Constitutions.

1. None of the exemptions granted serve the purpose of MCLE to maintain the currency of California lawyers or any other legitimate state purpose.

2. The Court of Appeal correctly concluded that the exemptions it considered were politically inspired. However, the Court of Appeal could not know, because the State Bar was not forthcoming, that it and a single

Senator, and not the California Legislature, were the major political players in this scenario, and that the State Bar officials had in fact made a conscious decision to request the Legislature to authorize a program which provided for discriminatory exemptions and thus did not afford the Legislature as a whole fair opportunity to authorize a program which applied equally to all California lawyers.

3. The Court of Appeal correctly concluded that the State Bar's claim that the purpose of MCLE is to protect the public from lawyers who serve individual private clients was factually and logically unfounded, that there are classes of California attorneys who do not represent individual clients and others who represent public agencies, although not at the state or federal level, who are not exempt, and that members of the exempt classes commonly do represent individual private clients.

4. No evidence exists to show a need for MCLE or that MCLE furthers the stated purpose of maintaining the currency of California lawyers or enhancing their competency.

5. The State Bar reveals a constitutionally impermissible elitist bent by contending, a priori, that attorneys who represent individual clients are more likely to need continuing education, i.e., are less competent and less ethical, than the exempted classes of attorneys.

6. There is no California authority for the State Bar's claim that a court reviewing a palpably discriminatory statute must accept

as a rational basis for the discrimination speculations of counsel which are inconsistent, irrational, or without a reasonable factual basis.

7. The Court of Appeal correctly concluded that its obligation under the so-called rational basis test was to "conduct a serious and genuine judicial inquiry".

8. The State Bar's claim that the impact of the exemptions is minimal is not borne out by the facts, and is not supported by any authority.

9. The Court of Appeal correctly ruled that Legislative decisions to "strike an evil where it is felt most" must be rationally based.

10. The invidious discriminations of the exemptions from MCLE, and the resulting unequal burden thrust upon appellant and other non-exempt California lawyers, are not reasonably related to a legitimate governmental purpose.

a. While the courts have an interest in assuring that all persons practicing law are competent, the present program--by the State Bar's argument applicable only to those attorneys who may serve individual private clients--completely misses the mark.

C. Appellant's Right to Practice His Established Profession Was a Vested Fundamental Right, a Right Which Controls Judicial Determination of the Constitutional Issues of Substantive and Procedural Due Process of Law and Equal Protection of the Laws.

1. Under California law, the right of an

individual to practice an established profession, once vested, is a constitutionally constitutionally protected "fundamental right".

2. Under federal law, the right to practice law is a "fundamental" right, a "liberty" protected by the Fifth and Fourteenth Amendments of the Constitution.

3. Respondents and the Court of Appeal ignored the essential distinction between pre-admission to practice rights, and the fully vested rights of an established law practice.

D. The State Bar's Initial Compliance Period Classifications Violated Equal Protection and Denied Appellant and Similarly Situated Attorneys Valuable Compliance-Time Rights Granted by Sec. 6070 and Rule 958.

1. The State Bar, solely on the basis of appellant's name and the names of other members similarly situated, invidiously discriminated against him by suspending him from practice for failing to complete 12 hours of approved study within one year, while allowing other members up to three years within which to complete 36 hours of study.

2. The State Bar's initial compliance period scheme denied appellant and other members the right granted by Sec. 6070 and Rule 958 to complete their 36 hours of approved study at any time within the three year period, rights which were extended to other members of the State Bar of different alphabetical classification.

E. The State Bar Violated Appellant's Right, and the Rights of All Other Attorneys Similarly Suspended, to Due Process of Law.

1. The State Bar deliberately evaded the Legislature's and this Court's directives that suspensions be in accordance with rules adopted by the State Bar.

2. Appellant's right to practice law was a form of property of which he could not lawfully be divested without a prior hearing meeting due process standards.

3. When the State Bar summarily suspended appellant and other members of the Bar from practice, ample procedural devices were in place for the State Bar's use.

4. Appellant had plainly made his objections to MCLE known and was entitled to have a hearing on the constitutional issues.

5. The State Bar's unconstitutional and draconian enforcement scheme is outrageous and ought to receive severe public censure.

F. Substantive Due Process of Law Forbids the State to Deprive a Person of the Right to Practice His Profession for Trivial or Insubstantial Reasons.

G. Suspension From Practice for Failure to Comply With MCLE Constitutes an Excessive Fine or Cruel and Unusual Punishment.

H. Appellant Suffered Substantial Damages Because of Respondents' Conduct For Which He is Entitled to Compensation Under the Federal Civil Rights Acts and State Tort Law.

* * *

APPENDIX P

APPELLANT'S PETITION FOR REHEARING
CALIFORNIA SUPREME COURT
(Filed September 10, 1999)
(Caption omitted.)

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D. "Strict Scrutiny" of Equal Protection Infringements Is Mandated Under Both State and Federal Precedent Because Appellant's Right to Practice His Established Profession Is a "Fundamental Right" Protected by the Due Process and Privileges and Immunities Clauses.

E. Recent Federal Court Opinion Reinforces Justice Brown's Dissent Based Upon the Privileges and Immunities Clause.

* * *

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Supreme Court, U.S.
FILED
FEB 17 2000
CLERK

No. 99-1194

IN THE

SUPREME COURT OF THE UNITED STATES
October Term 1999

LEW WARDEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA, et al,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Respondents the State Bar of California, Lorna Maynard and Carole Rossi respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of the State of California's opinion in this case. That opinion is reported at Warden v. State Bar, 21 Cal.4th 628; 982 P.2d 154; 88 Cal.Rptr.2d 283 (1999).

I. INTRODUCTION

California has joined 39 other states in adopting a mandatory continuing legal education ("MCLE") program as a consumer protection measure requiring lawyers in active practice to maintain certain minimum levels of continuing education. Petitioner Lew Warden seeks to invalidate California's entire MCLE program based on various constitutional challenges--principally that the narrow exemptions, which are applicable to only a fraction of the 123,000 practicing attorneys in California, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Petitioner also claims, without benefit of

authority, that the right to practice law, once granted by a state, is a fundamental right protected by the Privileges and Immunities Clause, the Equal Protection Clause and the Due Process Clause, that the nondiscretionary act by the California State Bar of placing petitioner on inactive status until petitioner complied with the MCLE program requirements violates the Due Process Clause and that placing petitioner on inactive status for failure to obtain 12 hours of educational credits in a 12-month period violates the Equal Protection Clause, the Due Process Clause of the Fourteenth Amendment and the Excessive Fines and Cruel and Unusual Punishment Clauses of the Eighth Amendment.

As demonstrated below, the applicable equal protection standard in reviewing classifications that are challenged in this context is the "rational relationship" standard not the "strict scrutiny" standard advanced by petitioner. The "rational relationship" standard was properly applied by the California Supreme Court in petitioner's case -- consistent with the

governing decisions of both this Court and California. The California Court's decision does not conflict with the decisions of this Court either on the proper standard to be applied or the application of that standard in this case. In light of the California Supreme Court's proper determination of the issues in petitioner's case, there is no basis for granting petitioner's Writ of Certiorari.

II. STATEMENT OF THE CASE

The California legislature enacted Business & Professions Code Section 6070 in 1989 which required the California State Bar ("State Bar") to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer an MCLE program. The statute directed the State Bar to include certain details in its request for the rule, including a provision that a member of the State Bar who failed to satisfy the MCLE requirements would be placed on inactive status and thus be unable to practice law in California until the requirements were met. The legislature

provided in section 6070(c)[1] that retired judges, officers and elected officials of the State of California, full-time professors at law schools accredited by the State Bar of California, The American Bar Association, or both, and full-time employees of the State of California, acting within the scope of their employment, shall be exempt from the requirements of the statute. (Pet's. App. G, pp. 134-135.)

Pursuant to the legislation, and after two public hearings, the State Bar filed with the California Supreme Court a request for a new rule of court authorizing the State Bar to establish a mandatory continuing education program. On December 6, 1990, the California Supreme Court amended its rules to add Rule 958 establishing the MCLE program. Rule 958 required the State Bar to administer an MCLE program ensuring that each member, not exempt, complete 36 hours of legal study within a 36-month period designated by the State

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[1]Unless otherwise indicated, all statutory references are to the California Business & Professions Code.

Bar. In addition to adopting the exemptions in Section 6070(c), the California Supreme Court added an exemption for full-time federal employees acting within the scope of their employment. (Pet's. App. G, p. 135.)

Following adoption of Rule 958, the State Bar adopted a set of rules and regulations governing the operation of the MCLE program. The regulations included the five exempted categories pursuant to Section 6070 and Rule 958 and included an additional provision– entitled "Good Cause Exemption From or Modification of Requirement"– that authorizes any member of the State Bar to "submit an application setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Legal Education. (Pet's. App. G, pp. 135-136.)[2]

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[2]Following the State Bar's adoption of the MCLE rules and (continued...)

California's MCLE program applies generally to all active members of the State Bar. The State Bar's official records[3] show that of the total number of exemptions granted to active members in the period 1994-1996 (based on the sum of year-end figures), only 144 (.14%) members were exempted as retired judges, 48 (.05%) as elected officers of the State, and 376 (.4%) as professors of accredited law schools. (Resp's. App. 4, pp. 86-89) [4]

Petitioner was an active member of the California State Bar in 1993 and vowed never to take any MCLE courses.

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[2](...continued)
regulations, the California State Bar Committee on Minimum Continuing Legal Education adopted a set of guidelines for its advisory interpretations of the MCLE rules and regulations.

[3]Pursuant to California Rules of Court, Rule 950.5, the State Bar maintains the official membership Roll of Attorneys for the California Supreme Court.

[4]The largest number of exemptions were for those in the categories of federal or state employees–2,477 (2.3%) and 1,611 (1.5%) respectively–two categories that have not been seriously challenged.

(Resp's. App. 4, p. 83.) Under the MCLE statute and rules, petitioner was obligated to complete 12 hours of credit between February 1992 and January 31, 1993 which petitioner acknowledged he did not do. Nor has petitioner applied for a "Good Cause Exemption" or a modification of any of the requirements imposed by the MCLE rules and regulations. On April 23, 1993, the State Bar sent petitioner a "Non-Compliance Notice," pursuant to its regulations, advising petitioner of what he was required to do to comply with the MCLE requirements and informing him that he had 60 days from the date of notification to comply with the required number of educational hours (12) or he would be enrolled as an inactive member of the California State Bar effective July 19, 1993. (Resp's. App. 3, p. 75.)[5] On July 9, 1993, petitioner

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[5]It is within petitioner's unilateral power to be reinstated administratively to active practice simply by completing the required hours of MCLE study, so certifying and paying delinquent fees. (Pet's. App. G.) A certain number of the required educational hours can be attained by self-study

(continued...)

wrote to the MCLE Compliance Coordinator of the State Bar, asserting that the MCLE program is unconstitutional and that he could not be prohibited from practicing law for refusing to comply with its requirements. On July 29, 1993 the State Bar sent petitioner a final notice advising him that his name would be submitted to the Board of Governors on July 17, 1993 with recommendation that effective July 19, 1993 he be enrolled as an inactive member of the Bar until he complied with the MCLE requirements. (Resp's. App. 3, pp. 78-79.) On July 30, 1993, the California State Bar sent petitioner a notice of enrollment on administrative inactive status, informing him that effective July 19, 1993 he was ineligible to practice law in California until the State Bar received proof of his compliance with the applicable MCLE requirements. On September 23, 1993, petitioner responded to the State Bar's July 30, 1993 notice expressing his profound disagreement with the MCLE

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[5](...continued)
courses. (Pet's. App. G, p. 133.)

program and threatening to sue the State Bar and its employees for damages if it did not "forthwith recall [its] suspension order."

On October 7, 1993, petitioner filed with the State Bar a "claim of damage," which after a review by the State Bar Board of Governors, was denied. Petitioner then filed a lawsuit in Alameda County Superior Court against the State Bar and certain of its employees seeking compensatory and punitive damages, declaratory relief, injunction, and mandate. (Pet's. App. H, p. 149.) In his complaint, petitioner claimed that the MCLE program was unconstitutional in numerous respects, asserting that the program denied him procedural and substantive due process of law and equal protection of the law. Among his other claims, petitioner alleged that the State Bar violated his rights to procedural due process and caused him to suffer damages even though he had received regular correspondence prior to his required compliance. Petitioner further alleged that Section 6070 and Rule 958 deprived him of

equal protection because of the program's allegedly discriminatory classifications and that the exemptions subjected him to differential treatment prohibited by the State and Federal Constitutions. (Pet's App. H.)[6]

The trial court granted summary adjudication in favor of the State Bar on all issues submitted by the Bar, thus effectively disposing of all aspects of petitioner's constitutional challenge. Petitioner appealed to the California Court of Appeal. The Court of Appeal focused almost entirely on petitioner's equal protection claim, in particular the claim that the MCLE program denied petitioner equal protection under the law because the program unjustifiably exempted certain categories of attorneys

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[6]Petitioner did not raise at any time in the State court proceedings his contention that his enrollment to inactive status violated his rights under the 8th Amendment. Thus, it would be proper for this Court to decline review of this issue. See Gupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc. 119 S.Ct. 1961 (1999). In addition, there is no merit to petitioner's claim that his being placed on inactive status is violative of the 8th Amendment. Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 109 S.Ct. 2909 (1989).

from the MCLE requirements that applied to petitioner and to other non-exempt attorneys. The Court of Appeal rejected petitioner's contention that his equal protection challenge should be evaluated under the "strict scrutiny" test. However, the Court of Appeal concluded under the "rational basis" standard of review that, while full-time state and federal employees who did not represent individual clients satisfied the rational relationship test, the exemptions for retired judges, officers and elected officials of the State of California and full-time professors at accredited law schools did not. Two of the three Court of Appeal justices concluded that the appropriate remedy was to invalidate the MCLE program as a whole, leaving the California legislature "to start anew and initiate comprehensive legislative reform of MCLE, rather than to accept a judicial reformation of Section 6070." The remaining justice, concluded that there was no need to "throw [] the baby out with the proverbial bath water" and suggested that the more appropriate solution was to excise the exemptions, which the justice

observed apparently applied to only a few hundred lawyers, rather than to invalidate the MCLE program as a whole. (Pet's App. B, p. 114.)

Petitioner and the State Bar filed separate petitions for review with the California Supreme Court. The California Supreme Court accepted for review the State Bar's petition which presented two principal issues: (1) whether the MCLE program violated federal or state equal protection principles by exempting certain categories of attorneys from the MCLE requirements, and (2) if so, what the appropriate remedy should be.

On August 26, 1999, the California Supreme Court issued its decision reversing the Court of Appeal's decision and concluded that the challenged exemptions were not unconstitutional under a proper application of the "rational relationship" standard. (Pet's App. A.) The California Supreme Court agreed with the Court of Appeal that the applicable equal protection standard of review in this context is

the "rational relationship" rather than the "strict scrutiny" standard but held that the Court of Appeal had erred in its application of the "rational relationship" standard in conducting its judicial review of the statute. The California Supreme Court also concluded that petitioner's procedural due process challenges lacked merit and that the trial court had properly rejected those claims. (Pet's App. A, p. 17, fn. 6), The California Court found that petitioner had been provided with ample notice of his noncompliance with the existing MCLE requirements, and since petitioner did not claim that he had complied with or was exempt from those requirements and there were no other factual questions to be resolved by a hearing, the State Bar's nondiscretionary administerial action of placing petitioner on inactive status without a hearing did not, under such circumstances, deny petitioner procedural due process. On September 9, 1999, petitioner filed a petition for rehearing which was denied by the California Supreme Court on October 20, 1999. Petitioner filed the instant Petition for Writ

of Certiorari with this Court on January 18, 2000.

III. ARGUMENT

A. There Is No Genuine Dispute or Conflict That the Traditional "Rational Relationship" Standard Governs Petitioner's Equal Protection Clause Challenge to California's MCLE Program.

The California courts that have considered petitioner's equal protection challenge to the MCLE program have agreed that petitioner's claims must be evaluated under the traditional "rational relationship" standard rather than the heightened "strict scrutiny" standard applicable in cases involving "suspect classifications" or "fundamental interests." There is no authority that would support petitioner's principal argument that the right to engage in the practice of law is a "fundamental" right or liberty for equal protection purposes, and that statutes or court rules that create classifications relating to the practice of law are therefore subject to the heightened "strict scrutiny" standard of judicial review. Governing decisions of this Court have made it clear that the rational relationship standard applies

to classifications involving those persons who already have obtained professional or occupational licenses, as well as to those applying for such licenses. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1995); Semler v. Dental Examiners, 294 U.S. 608, 610-611 (1935). California case law is consistent with these authorities. See, Bib'le v. Committee of Bar Examiners, 26 Cal.3d 548 (1980) (the conventional "rational relationship" test applied in an equal protection challenge to a State Bar rule that accorded differential treatment to bar applicants on the basis of whether they attended accredited or unaccredited law schools); Hernandez v. Dept. of Motor Vehicles, 30 Cal.3d 70, 81 (1981); Hughes v. Board of Architectural Examiners, 17 Cal.4th 763, 789 (1998); Wachs v. Curry, 13 Cal.App.4th 616, 624 (1993).

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), is not to the contrary. In Piper, this Court invalidated a rule against practice by out-of-state attorneys because it violated a fundamental right under the "Privileges and

Immunity Clause." Piper, supra, 470 U.S. at 284-88. Petitioner's reliance on Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1519 (!999) is also misplaced. Saenz v. Roe, supra, as with many of the cases cited by petitioner, did not involve equal protection challenges but rather raised challenges under the privileges and immunities clause and involved the constitutional right to travel. The present petition raises no such issues as they may relate to out-of-state attorneys.

Nor is there a conflict among the federal courts that the highly deferential "rational relationship" test governs the equal protection challenges raised by petitioner with respect to California's MCLE program. See, Lupert v. California State Bar, 761 F2d 1325, 1327 (9th Cir. 1985) (discrimination based on whether law student attends accredited or unaccredited law school does not infringe upon fundamental right), cert. denied, 474 U.S. 916 (1985); Edelstein v. Wilentz, 812 F.2d 128, 132 (3rd Cir. 1987) (no fundamental right to practice law); Verner v. State of Colorado, 533 F.Supp. 1109, 1118 (D. Colo. 1982)

aff'd, 716 F.2d 1352, 1353 (10th Cir. 1983) (applying the rational relationship standard in determining validity of exemption from state MCLE program).

Therefore, petitioner's attempt to avoid rational basis analysis by arguing that the right to practice law is a "fundamental" right giving rise to a strict scrutiny analysis for purposes of equal protection is contrary to established law.

B. The California Supreme Court's Application Of The Equal Protection Standard In Determining The Validity Of California's MCLE Program Is Consistent With Well Established Holdings Of This Court And Presents No Conflict Of Decisions And No Important Undecided Question.

The California Supreme Court followed the governing principles explained by this Court on more than one occasion that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for

the classification. [Citations]" FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Petitioner argues without authority that the proper focus should be on the supposed "actual" basis for the MCLE statute and rules rather than on the well-established "any conceivable basis" standard. However, as this Court has explained "On rational basis review, legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." FCC v. Beach Communications, Inc., supra, 508 U.S. at 515; Vance v. Bradley, 440 U.S. 93, 111 (1979). Where there is any conceivable justifications for statutory line-drawing, "it is, of course, constitutionally irrelevant whether the reasoning in fact underlay the legislative decision." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980).

As noted previously, Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274, relied on most heavily by petitioner, raised an attack on a fundamental constitutional right

relating to interstate travel and embodied an attack not under equal protection but under the privileges and immunities clause.

The California Supreme Court correctly concluded that California's MCLE program that generally requires attorneys licensed by the state to complete a specified number of continuing education courses did not violate the federal equal protection clause by exempting retired judges, state officers, and elected officials and full-time professors at accredited law schools. There can be no legitimate dispute that California's MCLE program serves a legitimate state purpose–protection of the public by insuring that lawyers continue to be fit and qualified to practice law. Lupert v. California State Bar, supra, 761 F.2d at 1327-38; Verner v. State of Colorado, supra, 533 F.Supp. at 1118. The MCLE requirements are intended to focus in the first instance on those attorneys who are most likely to engage in representing clients in private practice. The categories of exemptions therefore have in common the fact that as discreet groups the exempted attorneys are less likely to

engage in private practice or handle client funds than other attorneys. The California legislature in attempting to improve the overall competence of attorneys is not required to address the entire problem at once, but is allowed to address the problem one step at a time. Moreover, the legislature may apply the requirement only to groups of lawyers it thought most generally pertinent to its objective. Vance v. Bradley, supra, 440 U.S. at 109.

Petitioner argues that the limited exceptions to the MCLE program renders the entire program "underinclusive" in violation of equal protection. However, mathematical nicety with respect to regulatory line-drawing is not required under the rational relationship standard. FCC v. Beach Communication, Inc., supra, 508 U.S. at 315-16. Nor does the equal protection clause prohibit a state legislature from attacking a problem piece meal, "addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical Co., supra, 348 U.S. at 489; City of New Orleans v.

Dukes, 427 U.S. 297 (1976) (imposing restrictions on opticians but not optometrists or ophthalmologists); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463 (1949) (prohibiting advertising on all vehicles except vehicles carrying on business of owner).

Applying the rational relationship standard the Court properly concluded that there are at least two conceivable justifications that reasonably support the narrow exemptions to MCLE. The Court found it logical and not irrational that law professors, retired judges and legislators generally are less likely as a group to represent clients on a full or part-time basis–thus, rendering MCLE of a less serious need than for all other attorneys.[7] The Court also found that it was reasonable and not irrational to conclude that the exempted classes may be better trained and experienced as a group and thus in less need of

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[7]Although the California Supreme Court did not address the extremely limited total number of exemptions claimed in each of the categories, they are so di-minimus as to nullify petitioner's equal protection challenge to the MCLE program.

MCLE. The exemptions are therefore rationally related to the consumer protection purpose of the MCLE program in so far as they identify categories of attorneys who, as compared to other categories of attorneys, may not pose as serious a risk to consumers even if these narrow categories of attorneys are not subject to the same CLE requirements.

As this Court has clearly stated, the equal protection guaranty does not require or authorize a court to invalidate such a consumer protection measure simply because the program does not go as far as it might in protecting consumers. See, e. g. Railway Express v. New York, supra, 336 U.S. at 110, "It is no requirement of equal protection that all evils of the same genus be eradicated or not at all."); McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.") The governing authorities of this Court

establish that under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970) or because it may be "to some extent both under inclusive and over inclusive." Vance v. Bradley, supra, 440 U.S. at 108.

The California Supreme Court therefore properly applied the rational basis analysis in accordance with the principles enunciated in FCC v. Beach Communications, supra and did not do so to any "unreasonable extreme." In applying the rational basis test, the Court is not obligated, nor is it permitted to determine the validity of a legislative act on the subjective motivations of a particular drafter. Petitioner focuses his attack on the "improper" motives of the legislature in crafting one or more of the exemptions. Petitioner's argument as to what he perceives to be the true of political purposes for the exemptions not only lacks relevance but finds no support in

the record. [8]

C. The California Supreme Court Was Correct in Concluding That Petitioner's Substantive and Procedural Due Process Claims Lacked Merit.

Petitioner argues that his due process rights were violated because the MCLE Regulations make no provision for a hearing before a State Bar member's license to practice law can be suspended.[9] (Pet. pp. 28-29.) However, appellant was not entitled to a hearing prior to his transfer to administrative inactive status due to his deliberate refusal to comply with the

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[8] Petitioner improperly relies on a hearsay statement supposedly reported to an aid to the governor for its attack on the exemption for legislators. Petitioner cites no evidentiary support regarding the other exemptions. Nor does petitioner explain the California Court's independent adoption of Rule 958.

[9] Warden was not suspended but placed on administrative inactive status. The distinction is important since a member who has been placed on suspension must wait until his or her suspension has been completed. On the other hand a member who is placed on administrative inactive status can return to active status immediately upon completing the MCLE requirements and attesting that he or she has done so. (MCLE Regulations, § 15.1.)

MCLE requirements. This Court's opinion in Codd v. Velger 429 U.S. 624; 97 S.Ct. 882; 51 L.Ed.2d 92 (1977), is clear in stating that a hearing is not required where there are no issues of fact to be resolved.

In this case, the record clearly reflects that appellant was given notice and an opportunity to respond and show that he had in fact fulfilled the MCLE requirements. In response, he deliberately indicated his refusal to comply and indeed vowed he would never attend an MCLE lecture. (Resp's App. 3, p. 83.)

As this Court explained in Texaco, Inc. v. Short, 454 U.S. 516, 70 L.Ed.2d 738, 102 S. Ct. 781 (1982), there is no impermissible legislative limitation of procedural protections in a statute that provides a self-executing lapse of a property interest upon the owner's failure to perform a reasonable condition that indicates a present intention not to retain the interest. Thus, where no factual determination is necessary and no discretion is to be exercised, no process is due because the

owner of the property, not the state, terminates the interest through inaction.[10]

Furthermore, the California Supreme Court properly concluded that petitioner's substantive due process rights were not violated. As stated *infra*, there is no fundamental right being infringed by the current MCLE legislation. This Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable

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[10]Petitioner's petition also appears to suggest that he was improperly denied an opportunity to challenge, before the State Bar, the constitutionality of the MCLE program. California Constitution Article III, section 3.5(a) precludes an administrative agency from declaring a statute unconstitutional. However, there is no denial of due process where the constitutional challenge may be asserted upon a petition for judical review of the agency's action. Dash Inc. v. Alcoholic Bev. Control App. Bd. 683 F.2d 1229 (9th Cir. 1982.) Accordingly, even if appellant was given a hearing the only issue would be whether or not he had complied and from his own admission he had not. Therefore, a hearing would not have prevented him from being placed on administrative inactive status.

government regulation. Conn v. Gabbert 119 S.Ct 1292, 1295-1296; 526 U.S. 286; 143 L.Ed.2d 399 (1999). California's MCLE is a reasonable means of insuring that lawyers continue to be fit and qualified to practice law. (See Verner v. State of Colo. supra, 716 F.2d 1352, ["[A] state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a 'rational connection with the [attorney's] fitness to or capacity to practice law.' [Citations.] We cannot say that the CLE requirements in Colorado have no rational connection to a lawyer's suitability to practice law.")

The California Court's decision on this issue does not conflict with the decisions of this Court either on the proper standard to be applied or the application of that standard in this case.

IV. CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Dated: February 17, 2000

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 17 2000
CLERK

(5)

No. 99-1194

IN THE

SUPREME COURT OF THE UNITED STATES

LEW WARDEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA, et al,

Respondent.

APPENDICES TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LEW WARDEN, Plaintiff, v. THE STATE BAR OF CALIFORNIA, LORNA MAYNARD, CAROLE ROSSI, et al., Defendants.	Case No. 734372-4 DEFENDANTS LORNA MAYNARD,CAROLE ROSSI, AND THE STATE BAR OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES Date: August 28, 1995 Time: 10:00 a.m. Dept: 81 Trial Date: Sept. 29, 1995

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff by this action for declaratory and

injunctive relief and damages challenges the quasi-legislative action of the State Bar of California in adopting and promulgating Minimum Continuing Legal Education Rules and Regulations ("MCLE Regulations")[1] as authorized and required by California Rule of Court, rule 958 ("Rule 958"). Plaintiff claims that the MCLE Regulations are invalid as violative of plaintiff's rights to equal protection under the federal and state constitutions insofar as they allegedly discriminate against plaintiff because of his age, name, the manner in which he practices his profession, and because the MCLE Regulations exempt from the MCLE requirements retired judges, officers and elected officials of the State of California, full-time professors at law schools, full-time employees of the State of California and full-time employees of the United States Government. (Complaint,

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[1] The State Bar's MCLE Regulations are included in the defendants' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication, as Exhibit 1(a)(1).

pp. 5:11-6:20.)

Plaintiff further alleges that the ministerial action of the State Bar in enrolling him as an inactive member not entitled to practice law until he chose to complete the required hours of MCLE study violated plaintiff's right to due process under the federal and state constitutions in that he effectively was suspended without prior notice and an opportunity to be heard. (Complaint, p. 9:10-20.)

Plaintiff was required to complete 12 hours of educational activities by January 31, 1993, as part of the overall requirement of 36 hours every 36 months. (Complaint, p. 5:14-19.) (See MCLE Rules and Regulations, hereinafter "MCLE Regulations", sections 2-3.) Although plaintiff received several notifications of the compliance requirements, he deliberately refused to comply and was involuntarily placed on administrative inactive status on July 19, 1993. (Complaint, p. 2:27-3:7.)

As will be seen from the argument portion of this memorandum, plaintiff's complaint does not state facts

sufficient to warrant the granting of either declaratory or injunctive relief because plaintiff has failed to allege a cause of action for deprivation of his constitutional rights. In addition, the circumstance that substantial public interest will be served by allowing the MCLE requirements generally to be effectuated all militate against granting either declaratory or injunctive relief. Furthermore, these defendants are absolutely immune from liability for alleged violation of plaintiff's federal and state constitutional rights.

STATEMENT OF FACTS

All attorneys licensed to practice law in California must be members of the State Bar. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6002; Keller v. State Bar of California (1990) 496 U.S. 1, 110 S.Ct. 2228, 2235.) At present, the State Bar's active membership totals about 117,000.

In 1989, the California Legislature adopted Business and Professions Code section 6070, setting a

mandatory continuing legal education program for California lawyers into motion. (Bus. & Prof. Code, § 6070, subd. (a).) Instead of creating a continuing education program, the statute is cast in a conditional manner: "If the California Supreme Court adopts a rule authorizing the State Bar to establish and administer a mandatory continuing legal education program,..." then the State Bar must administer it. (Bus. & Prof. Code, § 6070, subd. (a).) The legislation further provided that if the Supreme Court ordered a mandatory continuing legal education program into existence, certain enumerated categories of attorneys would be exempt from the requirements. (Bus. & Prof. Code, § 6070, subd. (c).)

Pursuant to the legislation, the State Bar on July 19, 1990, filed with the Supreme Court a request for a new rule of court, authorizing the State Bar to establish a mandatory continuing legal education program.

On December 6, 1990, the Supreme Court ordered that the California Rules of Court be amended to add rule

958. Rule 958 mandated the State Bar to establish and administer a minimum continuing legal education program. The new Rule of Court also set forth additional categories of attorneys who would be exempt from the education requirements.

On December 8, 1990, the State Bar adopted the proposed MCLE Rules and Regulations (23 West's Cal. Code Ann. Rules, pt. 2 1981 ed., 1994 Cum. supp. pp. 608-619, hereafter "MCLE Regulations") to implement the program ordered into effect by the Supreme Court. The State Bar MCLE Regulations added a third category of exemptions: Section 6.2 of the MCLE Regulations specifies that members may request a good cause exemption from compliance with, or modification of, the MCLE requirements. (MCLE Regulations, § 6.2.)

Reading Rule of Court 958 and Business and Professions Code section 6070 together, all members of the State Bar are required to complete 36 hours of CLE during a 36-month period.

Attorneys may accrue MCLE credit in a variety of ways and at their own pace, including self-study, so long as the total number of credits are earned by the end of the compliance period. (See MCLE Regulations, §§ 4.1, 4.2, 5.2, 5.3, 5.4.) In order to make the administration of the program manageable, compliance reporting was set up as a three-stage process, with only one third of the State Bar's membership being required to report on their compliance each year. (See MCLE Regulations, §§ 3.1-3.4.)

In order to be fair to all members, the initial compliance period was set up to pro-rate the amount of required courses for each of the three compliance groups, i.e., Group 1, A-G was required to complete 36 hours by January 31, 1995; Group 2, H-M was required to complete 24 hours by January 31, 1994; and Group 3, N-Z was required to complete 12 hours by January 31, 1993. (MCLE Regulations, §§ 3.1, 3.4.)

Plaintiff, being in Group 3, was required to

complete 12 hours by January 31, 1993. On April 23, 1993, plaintiff was notified that he was not in compliance with the MCLE Regulations. Plaintiff failed to comply and on June 29, 1993 he was given a final notice that non-compliance with the MCLE requirements would result in his being administratively enrolled inactive. Plaintiff was administratively enrolled inactive on July 19, 1993.

I. ARGUMENT

1. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION FOR VIOLATING PLAINTIFF'S RIGHTS UNDER THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

a. Equal Protection. Plaintiff alleges that the MCLE Regulations violate the Equal Protection clause of the United States Constitution and the Constitution of the State of California in that, the MCLE Regulations discriminate against plaintiff because of his age, name, manner of practice as a sole practitioner, and because the MCLE Regulations exempts certain categories of attorneys. (Complaint, pp. 4:13-6:20.)

Defendants agree with plaintiff's assertion that the proper standard of review is the rational basis test. (Complaint, p. 4:26-27; 6:22-23.) In ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose. (Giannini v. Real (9th Cir. 1990) 911 F.2d 354, 358, cert. denied, 498 U.S. 1012.)

With respect to the constitutionality of MCLE programs, a federal district court in Colorado upheld the constitutionality of that State's mandatory continuing legal education program against the charge, among others, that it violated the attorney's Fourteenth Amendment rights of due process and equal protection. In affirming the lower court's dismissal of the action the court stated:

> "Ample precedent exists supporting the authority to prescribe minimum levels of legal competency, measured by a bar examination, as a prerequisite to admission to a state bar. (Citations omitted) A fortiori, a state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements

> have a 'rational' connection with the [attorney's] fitness or capacity to practice law. (Citations omitted) We cannot say that the CLE requirements in Colorado have no rational relation connection to a lawyer's suitability to practice law."

(Verner v. State of Colorado (D. Colorado 1982) 533 F.Supp. 1109, affd. 716 F.2d 1352, 1353, cert. den. 466 U.S. 960, 104 S. Ct. 2175.)

Plaintiff first alleges that the MCLE program discriminates against him because of his age, in that he was born in 1920. (Complaint, p. 4:14-20.) All active members of the State Bar not exempt from compliance under MCLE Regulations 6.0 et. seq. are required to comply with the MCLE Regulations. Nowhere in the MCLE Regulations is age listed as a means of identifying members for compliance. Age is not a factor when determining whether or not a member must comply with the MCLE Regulations.

Plaintiff next alleges that he is being discriminated against because his name begins with a "W". (Complaint, p. 4:14-20.) Three compliance groups were created

according to the alphabet. Compliance group one consists of members whose names begin with the letters A-G. The initial compliance period for the group requires each member to complete 36 hours of activities by January 31, 1995. (MCLE Regulations, §§ 2.1 and 3.2.) Compliance group two consists of members whose names begin with the letters H-M. The initial compliance period for this group required each member to complete 24 hours of activities by January 31, 1994. (MCLE Regulations, § 3.3.) Compliance group three consists of members whose names begin with the letters N-Z. The initial compliance period for this group required each member to complete 12 hours of activities by January 31, 1993. (MCLE Regulations, § 3.4.)

Although plaintiff's group (N-Z) was the first to comply with the MCLE Regulations, he was only required to complete 12 hours of activities. Under the initial compliance period each group was required to complete the same amount of hours of activities during the same

time period, i.e., Group 1, 36 hours in 36 months, Group 2, 24 hours in 24 months, and Group 3, 12 hours in 12 months. Therefore, plaintiff's requirements are the same as any other member in another compliance group.

Plaintiff further alleges that he is being discriminated against because as a sole practitioner he cannot benefit from in-house training available in firms, and, consequently, he is forced to attend expensive, time-consuming, and wasteful lectures. (Complaint pp. 4:14-27; 6:15-21.) As previously stated, MCLE requirements apply to all non-exempt members of the State Bar. Plaintiff completely ignores the fact that he, like any other member, can fulfill his educational requirements in a variety of ways: viewing videotapes or film instruction, listening to audiotapes, speaking in approved education activities, and participating in self-assessment testing (open-book tests). (MCLE Regulations, § 4.0 et.seq.)

Clearly the MCLE Regulations do not pertain to a member's name, age, and type of practice the member

engages in, but are neutral on their face.

Plaintiff next alleges that he is being denied equal protection because of the program's allegedly discriminatory classifications in that the program exempts members who are retired judges, officers and elected officials of the State of California, full time professors at law schools accredited by the State Bar or the ABA, and employees of the State of California, and the United States government. (Complaint, p. 6:4-14.)

There is no fundamental right to practice law and in examining claims of discrimination in professional licensing, the appropriate standard is the rational relationship test. (See, e.g., Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328, cert. denied 474 U.S. 916, 106 S.Ct. 241.) The question whether there is a conceivable legitimate basis for exempting certain limited categories of California attorneys from the MCLE requirements must be answered in the affirmative. Indeed, one conceivable basis is apparent from the more fully

expressed of the exemptions pertaining to state and federal employees, as well as from administrative interpretations of the exemptions by the State Bar's Committee on MCLE as enunciated in the MCLE Guidelines issued to date.[2] By express language in section 6070 and rule 958, exemptions for active members of the State Bar who are employed by the state or federal government are limited to "full-time" employees and those who are "acting within the scope of their employment." This has been interpreted in the Guidelines to mean that state and federal employees are exempt only if their practice of law is limited to the performance of their duties as state or federal employees, and that if they engage in practice outside the scope of their employment, including pro bono work or legal work for friends or family, the attorneys lose their exemptions. (See MCLE Guidelines 6.1.4 and 6.1.5.) A

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[2] The contemporaneous administrative interpretation of a statute by an administrative agency is entitled to great weight and will not be departed from unless clearly erroneous. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 647.)

conceivable, legitimate rational basis, then, for the exemption for full-time state and federal government lawyers is that they do not engage in practice outside the scope of their employment and therefore do not pose the same risk of harm to members of the public as do the majority of attorneys. Indeed, it is common knowledge that government attorneys have extensive in-house and associational continuing education programs, and are subject to peer review and promotion examination. Moreover, most governmental agencies self-insure against the risk of attorney negligence or malfeasance, and government attorneys who do not meet performance standards are subject to termination.[3]

In addition, other rational bases may be posited for the remaining exemptions, consistent with the established equal protection doctrine that legislation need not fully

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[3] Accordingly, subdivision (b) of section 6070 provides specific approval for programs by the California District Attorneys Association and the California Public Defender Association.

cover the field and may address "degrees of evil." (See, e.g., Williamson v. Lee Optical of Oklahoma (1955) 348 U.S. 483, 489, 75 S.Ct. 461, 465; Leavenworth Properties v. City and County of San Francisco (1987) 189 Cal.App.3d 986, 992-993.)[4] As Professor Tribe has noted, "[w]ithin very broad limits, courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally." (Tribe, American

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[4] Thus, full-time professors engage in research, writing and teaching and are on the cutting edge of new developments in the law, so that the public interest is not significantly furthered by MCLE. Moreover, they do not handle client funds or administer trust accounts. Retired judges will have been at the forefront of interpreting and applying the law, and their retired status ought to justify exemptions, particularly if they continue to involve themselves in dispute resolution as arbitrators or mediators and do not represent clients or administer trust funds. And with regard to state officers and elected officials, one might assume that at least for the most part, they will not find time to be actively engaged in private practice and will also be situated to be well informed about new legislative developments in the law, especially those relating to their particular areas of expertise.

Constitutional Law (2d ed. 1988) ch. 16, § 16.2, p. 1440.)[5]

b. Procedural Due Process. Finally, plaintiff alleges that his due process rights were violated because the MCLE Regulations make no provision for a hearing before a State Bar member's license to practice law can be suspended. (Complaint, p. 4:14-5:10.)

Plaintiff became aware of the MCLE requirements in 1992, and knew that if he did not comply, an "attempt" would be made to place him on inactive status. Moreover, plaintiff was notified on April 23, 1993, that he was not in compliance with the MCLE Regulations and that he had 60 days within which to provide proof of compliance (i.e., proof of completion of 12 hours of MCLE study) or be

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[5] Although plaintiff claims to have been suspended form the practice of law, (Complaint, p. 6:4-8) he was in fact administratively enrolled as an inactive member. The distinction is important because being placed on administrative inactive is separate from a disciplinary suspension. Enrolling a member inactive without going through the discipline system is rationally related to the State Bar's goal in keeping members out of the discipline system and the potential stigma of having a disciplinary suspension on their record. Moreover, plaintiff at all times has had it within his power to return to active status simply by completing the required MCLE compliance card. (See Exhibit 1(a)(10).)

enrolled as an inactive member. Thereafter, on June 29, 1993, pursuant to section 13.2 of the MCLE Regulations plaintiff was sent a final notice informing him that if he failed to complete the MCLE requirements he would be enrolled as an inactive member on July 17, 1993. On July 30, 1993, plaintiff was informed that he had been enrolled as an inactive member. (See MCLE Regulations, section 14.0, et. seq.)

While plaintiff implicitly concedes, as he must, that he received ample notice of the MCLE requirements, and was aware that the MCLE Regulations provided for transfer to inactive status on failure to comply, he nevertheless asserts that due process requires that he be afforded some sort of "hearing" before such transfer. Quite clearly, however, there were no disputed issues of fact to be determined, plaintiff having declared his intention never to comply. And neither was there any discretion to be exercised since the precipitating event -- i.e., failure to furnish proof of compliance -- admittedly

occurred, the State Bar then being under a mandatory duty to ministerially transfer plaintiff to inactive status. (See Bus. & Prof. Code § 6070(a) and Rules of Court, rule 958(d) [a member who fails to satisfy MCLE requirements "shall be enrolled as an inactive member"]. It is well established that the Legislature constitutionally may provide for the "automatic" revocation or suspension of a license upon the happening of a specified event, without the necessity of a hearing, where there are no questions of fact to be resolved or judgment to be exercised. See DiGenova v. State Board of Education (1955) 45 Cal.2d 255, 260-263; Slaughter v. Edwards (1970) 11 Cal.App.3d 285, 293-294.

As the California Supreme Court explained in Coleman v. Dept. of Personnel Admin. (1991) 52 Cal.3d 1102, 278 Cal.Rptr. 346, 354, citing Texaco, Inc. v. Short (1982) 454 U.S. 516, 102 S. Ct. 781, no impermissible legislative limitation of procedural protections is involved in the case of a statute that provides a self-executing lapse

of a property interest upon the owner's failure to perform a reasonable condition that indicates a present intention not to retain the interest. Thus, where no factual determination is necessary and no discretion is to be exercised, no process is due because the owner of the property, not the state, terminates the interest through inaction.

Moreover, under the rationale of Coleman, plaintiff is not entitled to any post-suspension evidentiary hearing because inactive enrollment for failure to comply with MCLE is not the equivalent of a disciplinary suspension and because again there are no factual issues to be resolved or discretion to be exercised, plaintiff himself being able to obtain his reinstatement administratively, simply by furnishing proof of completion of the required hours of MCLE study.

2. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT

Plaintiff alleges that upon his admission to the

practice of law in the State of California, a written and unwritten contractual relationship was established between himself and the State Bar, which included the implied covenant that defendants would act fairly toward and in good faith with plaintiff. Plaintiff further alleges that defendants both contractually and tortiously, breached said implied covenant of good faith and fair dealing. (Complaint, p. 9:23-10:6.)

It is well settled that an application for a license or permit to practice law does not create a contract. (Engel v. McCloskey (1979) 92 Cal.App.3d 870, 883.) Therefore, plaintiff's cause of action for damages for breach of contract has no merit.

3. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR DAMAGES AGAINST THESE DEFENDANTS FOR ALLEGED VIOLATION OF HIS FEDERAL CIVIL RIGHTS (42 U.S.C. § 1983)

Plaintiff has attempted to state a cause of action against the State Bar as an entity and two of its employees in their respective official capacities as attorney and

administrative assistant for alleged violation of plaintiff's civil rights, presumably pursuant to 42 U.S.C. section 1983. (See Complaint, par. XVIII, at 10:7-18.) Plaintiff fails to state a federal law claim for damages, however, because neither a state agency nor its employees sued in their official capacities are "persons" within the meaning of 42 U.S.C. section 1983. (See Will v. Michigan Dept. of State Police (1989) 491 U.S. 58, 109 S. Ct. 2304, 2308-2309, 2312.) Moreover, even if the State Bar defendants were suable "persons", it is well established that the State Bar and its officials enjoy absolute quasi-judicial and quasi-legislative immunity from federal civil rights actions for damages arising out of their conduct of attorney licensing proceedings. (See Rosenthal v. Vogt (1991) 229 Cal.App.3d 69, 76; Lebbos v. State Bar (1985) 165 Cal.App.3d 656, 665-666; Levanti v. Tippen (S.D. 1984) 585 F.Supp. 499; See also Rosenthal v. Justices of the Supreme Court of California (9th Cir. 1990) 910 F.2d 561, 565-566, cert. denied (1991) 498 U.S. 1087 [111 S.Ct.

963]; Govt. Code §§ 818.4, 821.2 [public entity and public employees not liable for injury caused by denial or suspension of a license].) This immunity applies no matter however motivated or however intrinsically erroneous such proceedings may have been. (See Greene v. Zank (1984) 158 Cal.App.3d. 497 at 507; Rosenthal v. Justices, supra, 910 F.2d at 565-566.)

4. THE STATE BAR DEFENDANTS ARE IMMUNE FROM TORT LIABILITY FOR DAMAGES FOR ALLEGED VIOLATION OF STATE LAW, UNDER THE TORT CLAIMS ACT'S LICENSING ACTIVITY PROVISIONS, AND UNDER THE COMMON LAW DOCTRINES OF QUASI-JUDICIAL AND LEGISLATIVE IMMUNITY.

Decisive law establishes that just as the State Bar and its employees are immune from federal civil rights damages liability for their licensing activities, so are they immune under state law. See Rosenthal v. Vogt, supra, 229 Cal.App.3d at 74. [State Bar and its officer and employees are immune from liability for alleged negligent and intentional infliction of emotional distress and breach of fiduciary duty]. Engel v. McClosky, supra, 92

Cal.App.3d at 881-883, 884-887. [State Bar Committee of Bar Examiners and its employees immune from liability for damages for allegedly negligently performing and intentionally delaying moral character investigations.]

5. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO DEMONSTRATE IRREPARABLE INJURY JUSTIFYING THE EXTRAORDINARY EQUITABLE REMEDY OF A BLANKET PROHIBITORY INJUNCTION AGAINST THE IMPLEMENTATION OF THE MCLE PROGRAM

As pointed out above, plaintiff has not only an available administrative remedy before the State Bar by way of request for waiver of the requirements he objects to, but also a remedy by way of direct original petition to the Supreme Court to consider all their constitutional challenges to the facial validity of the MCLE Regulations and Supreme Court Rule 958. Injunction is an extraordinary power and should be granted only in those cases where it fairly appears on all papers presented that plaintiff will suffer imminent or irreparable injury. (Code Civ. Proc., § 526, subd. (2); City and County of San

Francisco v. Market St. Ry. Co. (1950) 95 Cal.App.2d 648.)

As Witkin points out, an injunction is regarded as an extraordinary remedy which should only be granted, with caution, and indeed which should be denied where there are other judicial or administrative remedies and no real threat of immediate and irreparable injury. (See 6 Witkin, Cal. Procedure (3d. ed. 1985) Provisional Remedies, §§ 253-254, 267, 277-278, 282, pp. 221, 230, 238-239, 247.) And as Witkin also points out the interest of the public is a separate, independent factor to be considered in determining whether to grant injunctive relief. (Id. at § 282, pp. 241-242.) Here, it is submitted, the interests of the public -- or at least the consumers of legal services among them -- would be substantially disserved by an injunction against implementing the MCLE requirements for California's 115,000 active lawyers.

6. THE STATE BAR IS ABSOLUTELY IMMUNE FROM PUNITIVE DAMAGES

Government code section 818 provides:

> "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

The State Bar, as a governmental entity is absolutely immune from the imposition of punitive damages. In addition, with respect to the individual defendants, specific factual allegations are required to support a claim for punitive damages. (Brousseau v. Jarrett (1977) 73 Cal.3d 864.) In this case, plaintiff has failed to allege any specific facts other than inferences which would support a cause of action for punitive damages.

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that the demurrer be sustained without leave to amend; and that the action be dismissed.

//

//

DATED: July 31, 1994

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LEW WARDEN Plaintiff, v. THE STATE BAR OF CALIFORNIA,LORNA MAYNARD,CAROLE ROSSI, et al., Defendants.	Case No. 734372-4 SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS STATE BAR, MAYNARD AND ROSSI'S MOTION FOR SUMMARY JUDGMENT Date: August 28,1995 Time: 10:00 a.m. Dept.: 81 Trial Date: Sept. 29, 1995

Defendants State Bar of California, Lorna

Maynard and Carole Rossi submit the following Statement

APPENDIX 2

of Undisputed Material Facts together with references to supporting evidence, pursuant to Code of Civil Procedure, section 437(b). By reason of these facts, it is established that there is no merit to the following several claims or legal theories, not separately stated, on which plaintiff seeks recovery of compensatory and punitive damages, as well as declaratory and injunctive relief, arising out of the State Bar's action in enrolling plaintiff on administrative inactive status as of July 19, 1993, for plaintiff's deliberate refusal to complete minimum continuing legal education, as required by section 6070 of the Business and Professions Code, rule 958 of California Rules of Court, and the State Bar's Minimum Continuing Legal Education Rules and Regulations.

CLAIM NO. 1, NO DENIAL OF PROCEDURAL DUE PROCESS:

(Complaint, paragraphs III, IV, V, VI, part of VII [5:3-9] and XV) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and

Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pp. 11-13.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
1. Plaintiff is a 75 year old attorney who was first admitted to practice in California in 1953, and who at all times since then until July 19, 1993, was an active member in good standing of the State Bar of California, engaged in the practice of law as a sole practitioner. Throughout most of this period, plaintiff's office has been at various addresses in the Bay Area where he shared	1. Complaint, at 2:12-21, 4:19-20; 5:14. Plaintiff's answers to defendants form interrogatories (set one), nos. 2.1, 2.6(b) and 8.2, Ex. 1(b), at 2:1; 2:22; 4:4. Plaintiff's deposition. Ex. 1(a) at 16:5-25, 93:2-8.

space with other attorneys, but plaintiff has practiced his "specialty", civil litigation at the trial and appellate level, throughout the state.

2. By July, 1993, plaintiff was living aboard his yacht, "Rocking Chair," and was travelling between and stopping at various marinas and harbors. While plaintiff did not consider himself formally retired and while he continued to work on litigation matters from his yacht, he nevertheless had reduced his production of

2. Plaintiff's answers to defendants' form interrogatories (set one) no. 2.5, Ex. 1(b), at 2:5-18. Plaintiff's deposition, Ex. 1(a), at 11:8-20, 31:4-23, 32:7-34:4, 44:19-22, 55:12-19. 56:4-15, 58:7-14, 83:4-8.

income and the taking on of new cases. Plaintiff hoped to continue working on a part-time basis as a paralegal for other attorneys, but did not want to be responsible for cases.	
3. In June 1991, and again in March 1992, the State Bar mailed to all its members at their last known addresses as shown on the State Bar's official records, notices and instructional materials concerning the study and reporting requirements of the State Bar's Minimum Continuing Legal	3. Plaintiff's deposition, Ex. 1(a) at 11:21-12:17. Declaration of Jennifer Blackford, Ex. 2, at 2:3-26. Certified copies of Custodian of Records, Ex. 3.

Education Program ("MCLE"), which went into effect on September 1, 1991, and the study requirements, of which began February 1, 1992.	
4. Plaintiff claims not to have received the materials described in fact 3, above, but admits having learned of the MCLE program in 1992 from other attorneys and people in his office.	4. Plaintiff's deposition, Ex. 1(a) at 11:21 to 16:4, 81:25-82:11, 100:19-22.
5. Plaintiff understood in 1992 that if he did not comply with the MCLE requirements, there would be "an attempt" to	5. Plaintiff's deposition, Ex. 1(a), at 15:7-16:4.

place him on inactive.

6. Plaintiff considers MCLE a nonsensical and expensive waste of time. Plaintiff believes that as a result of his many years of practice and through researching matters very extensively, he knows as much or more law than those who provide MCLE programs. Plaintiff has vowed never to attend a MCLE lecture.	6. Plaintiff's deposition, Ex. 1(a), at 79:2-82:11, 90:2-8, 97:8-13, 103:1-3.
7. Sometime before January 31, 1993, plaintiff received from the State Bar at least part of a five page MCLE compliance letter	7. Plaintiff's deposition, Ex. 1(a), at 84:16-85:8, 90:2-8, 102:10-19, 110:10-114.17.

mailed to all members in MCLE compliance group 3 (those members whose last names began with the letters N-Z). (Plaintiff was able to find in his file only pages 1, 2 and 5 and part of page 4.) This letter enclosed MCLE worksheets to record hours of studies completed and an MCLE compliance card to be returned to the State Bar attesting to completion of at least 12 hours of study by February 1, 1993. Plaintiff did not fill out and return the card because he had not complied.

8. Plaintiff first read the MCLE rules in about April 1993. At that time, plaintiff believed he had three years to comply with the MCLE program requirements, and he determined not to comply because he believed that by the time three years had passed he would be retired or deceased. By early July, 1993, however, when it became apparent that proof of compliance would be required after one year, plaintiff determined he would not participate because he believed the	8. Plaintiff's deposition, Ex. 1(a), at 13:8-16:4, 17:24-19:1, 21:22-24, 35:13-16, 36:17-19, 81:19 to 85:8, 91:7-15, 94:25-95:1, 102:10.

MCLE requirements were unconstitutional; and plaintiff decided either to make the State Bar "back off" or to litigate it.	
9. Plaintiff received from the State Bar a MCLE Non-Compliance 60 Day Notice dated April 23, 1993, informing plaintiff that if he did not forward proof of compliance with the MCLE requirements by June 22, 1993, he would be enrolled as an inactive member not permitted to practice until proof of compliance was received	9. Plaintiff's deposition, Ex. 1(a), at 17:24-19;11, 109:21-110:5.

by the State Bar. Plaintiff read and understood this notice.

10. Plaintiff received from the State Bar a MCLE Non-Compliance Final Notice dated June 29, 1995, advising plaintiff that he would be enrolled as an inactive member effective July 17, 1993, and continuing until such time as he had complied with the MCLE requirements. Plaintiff read and understood this notice.

10. Plaintiff's deposition, Ex. 1(a), at 19:2-21, 109:21-110:5.

11. By letter dated July 9, 1993, written by

11. Plaintiff's deposition, Ex. 1(a), at

plaintiff and received by the State Bar, plaintiff responded to the final notice described in fact 10, above, and advised the State Bar that he contested both the constitutionality of the State Bar's "absurd MCLE program" as well as the constitutionality of the "summary procedures" for administratively placing non-complying members on inactive status without a pre-deprivation hearing.	19:22 to 21:12, 109:21-110:5.
12. By letter dated July 23, 1993, defendant Lorna Maynard, a senior administrative assistant	12. Plaintiff's deposition, Ex. 1(a), at 24:12-25:17, 26:13-27:7, 109:21-110:5.

employed by the State Bar responded to plaintiff's letter described in fact 11, above, and advised that it had been referred to the State Bar's General Counsel for response. Defendant Maynard's said letter indicated that a copy ("cc") had gone to defendant Carole Rossi.

13. Plaintiff thereafter received from the State Bar a Notice of Enrollment on Administrative Inactive Status dated July 30, 1993, advising him that he had been placed on administrative inactive

13. Plaintiff's deposition, Ex. 1(a), at 22:1-23:10, 109:21-110:5.

status as of July 19, 1993, and that he could secure return to active status by submitting proof of MCLE compliance and payment of a $50.00 non-compliance fee. Plaintiff read and understood this notice.

14. Plaintiff was one of some 380 attorneys in compliance group 3 (last names beginning with N-Z) who did not furnish proof of compliance with MCLE requirements and who on July 19, 1993, were administratively enrolled as inactive	14. Defendant's Request for Judicial Notice, Ex. JN1-JN2. Plaintiff's deposition, Ex. 1(a), at 22:16-23:10, 28:6-12, 105:6-14.

members by defendant State Bar.	
15. Plaintiff did not request a good cause exemption or modification of MCLE requirements under MCLE Regulations, sections 6.2 to 6.3.	15. Plaintiff's deposition, Ex. 1(a), at 36:17-37:5, 105:6-106:5.
16. No evidentiary hearing was granted to plaintiff prior to his being administratively enrolled as an inactive member.	16. Complaint, at 2:26-3:6, 9:17-21. Plaintiff's deposition, Ex. 1(a), at 30:15-22, 100:15-101:4, 105:6-14.
17. Plaintiff responded to the notice of his enrollment as an inactive member by letter to the State Bar dated	17. Plaintiff's deposition, Ex. 1(a), at 27:8-28:16.

September 23, 1993, to the attention of defendant Maynard. Plaintiff expressed his "profound disagreement" with the State Bar's "useless, burdensome and expensive program" and threatened that if the State Bar did not "forthwith recall [its] suspension order and forthwith so advise all courts," plaintiff would bring an action for damages against the State Bar and each of its officers and employees who allegedly caused such suspension.

18. On or about October 7, 1993, plaintiff filed with the State Bar a "Claim of Damages" in which he asserted the State Bar's liability to him for lost income at the rate of approximately $6,000 per month and an unspecified sum for "emotional distress and upset" as the result of his having been placed on administrative inactive status for failure to comply with what he alleged were the MCLE's unconstitutional requirements. This claim was denied by the State	18. Complaint, paragraph XXIII at 11:9-1. Plaintiff's deposition, Ex. 1(a) at 11:9-11.

Bar on or about November 5, 1993.	
19. By letter dated October 22, 1993, defendant Rossi, an attorney employed by the State Bar as an Assistant General Counsel in its Office of General Counsel, replied to plaintiff's letters dated July 9, 1993, and September 23, 1993, and advised plaintiff that he had been enrolled as an inactive member for failure to comply with the State Bar's MCLE requirements pursuant to the express provisions of both	19. Plaintiff's deposition, Ex. 1(a) at 34:5-35:16.

Business & Professions Code section 6070(a) and rule 958(a), California Rules of Court, in addition to the MCLE Regulations. Defendant Rossi also acknowledged receipt of plaintiff's Claim for Damages dated October 7, 1993, and advised that it had been forwarded to the Board of Governors for Review.

20. Plaintiff at all times has had it within his power to be reinstated as an active member entitled to practice law by furnishing proof of his	20. MCLE Regulations, sections 15.1, 15.2. Plaintiff's deposition, Ex. 1(a), at 101:21-102:19, 103:1-3. MCLE Regulations,

compliance with the MCLE requirements and paying such fees as may be due, if any.	section 15.0.
21. Plaintiff did not seek review by the California Supreme Court of the State Bar's action in transferring him to inactive status, pursuant to rule 952(d), California Rules of Court.	21. Plaintiff's deposition, at 91:16-92:18.

CLAIM NO. 2, NO DENIAL OF EQUAL PROTECTION:

(Complaint, paragraphs VII, VIII, IX, X, XI, XII, XIII and XIV) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities In Support of Motion for Summary Judgment or Summary Adjudication, at pp. 6-11.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
22. Plaintiff did not claim to be within any of the categories of persons exempted from the MCLE requirements by Business & Professions Code section 6070, California Rules of Court, rule 958, or MCLE Regulations 6.1 to 6.1.5, i.e. retired judges, officers and elected officials of the State of California, full-time professors at accredited law schools, full-time employees of the State of California, and full-time	22. Complaint, at 4:18-26, 6:9-13. Plaintiff's deposition, Ex. 1(a), at 95:3-96:20.

employees of the United States government; and plaintiff was not granted any such exemption.

23. At the time plaintiff was administratively enrolled on inactive status in July 1993, plaintiff was 73 years old and engaged in private practice as a sole practitioner. Plaintiff had not formally retired, but had reduced his production of income and was not taking on new cases, but trying to get out of it. Plaintiff did not want to be responsible for cases and

23. Complaint, at 4:18-23. Plaintiff's deposition, Ex. 1(a), at 16:16-25, 31:10-33:11, 55:12-13, 56:10-25, 57:1-59:6, 83:4-8.

hoped to work essentially as a paralegal for other attorneys.

24. As an attorney whose last name began with the letter "W," plaintiff was in what the MCLE Regulations identified as Compliance Group 3, comprised of those members whose last names began with the letters N-Z. Members in Compliance Group 3 were required to complete at least 12 hours of continuing legal education during the period February 1, 1992, to January 31,

24. Complaint, at 4:20, 5:14-26. Plaintiff's deposition, Ex. 1(a), at 84:10-24, 86:6-9, 88:9-19, 93:12-24. MCLE Regulations, sections 3.0-3.6, 12.0

1993, and to attest to such compliance by submitting a compliance card to the State Bar no later than February 1, 1993.

CLAIM NO. 3, NO BREACH OF EXPRESS OR IMPLIED CONTRACT:

(Complaint, paragraphs XVI and XVII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at P. 14.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
25. There was no express agreement, written or oral, between plaintiff and defendant State Bar or any of its officers or employees regarding the	25. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 7:11-8:14. Plaintiff's deposition, Ex.

action to be taken by the State Bar as the result of plaintiff's refusal to comply with the MCLE requirements.	1(a), at 106:6-11, 109:14-20.
26. Plaintiff's assertion of an implied-in-fact contractual covenant of good faith and fair dealing is based solely on the correspondence between the State Bar and plaintiff, in particular the letter to plaintiff dated July 23, 1993, from defendant Maynard and the letter to plaintiff dated October 22, 1993, from defendant Rossi, both of which	26. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 7:11-8:14. Plaintiff's deposition, Ex. 1(a), at 103:24-104:12, 106:6-11, 109:15-18.

plaintiff contends impliedly represented that the State Bar would consider plaintiff's contentions that the MCLE program was unconstitutional and would confer with or respond to him before placing him on inactive status.	
27. Plaintiff's assertion of an implied-in-law contractual covenant of good faith and fair dealing is based entirely on the constitutional, statutory, decisional and rule of court law governing the relationship between	27. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 6:25-7:10, 8:6-13. Plaintiff's deposition, Ex. 1(a), 104:1-10; 106:6-11; 109:14-20.

the State Bar and its members.

CLAIM NO. 4, NO CAUSE OF ACTION FOR TORTIOUS BREACH OF IMPLIED CONTRACTUAL COVENANT OF GOOD FAITH AND FAIR DEALING:

(Complaint, paragraph XVII) (See discussion in defendants' State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at p. 14.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
28. Plaintiff's claim for damages for "tortious" breach of the implied contractual duty of good faith and fair dealing is based on the same undisputed facts stated immediately above, i.e.	28. See evidence listed immediately above, opposite facts nos. 25, 26 and 27.

nos. 25-27.

CLAIM NO. 5, NO BREACH OF PLAINTIFF'S FEDERAL CIVIL RIGHTS AND DEFENDANTS NOT "PERSONS" WITHIN THE MEANING OF 42 U.S.C. SECTION 1983:

(Complaint, paragraph XVIII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pgs. 14-15.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
29. Defendant State Bar is a constitutional agency in the judicial branch of state government that acts as the administrative arm of the California Supreme Court	29. See plaintiff's answers to State Bar Defendants' First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 1:24-28. Plaintiff's deposition, Ex. 1(a), at

in all matters relating to the admission, discipline and reinstatement of attorneys.

29:2-5. See also, California Constitution, Article VI, section 6, Business & Professions Code section 6008, 6008.2; Saleeby v. State Bar (1985) 39 Cal.3d 547, 565; Rosenthal v. Justices (9th Cir. 1990) 910 F.2d 561, 565-566.

30. At all times mentioned in the complaint, defendant Carole Rossi was an attorney employed by the State Bar in its Office of General Counsel, as an Assistant General Counsel. At all such times,

30. Complaint, at 1:22-27. Plaintiff's Answers to Defendants' Form Interrogatories (set one) no. 14.1, Ex. 1(b), at 6:15-22, Plaintiff's Answers to Defendants' First Set of Special Interrogatories (set one)

defendant was acting within the scope and course of her official duties as such employee.	no. 1, Ex. 1(c), at 2:4-13, 3:15-16.
31. At all times mentioned in the complaint, defendant Lorna Maynard was an employee of the State Bar, assigned to its Office of Certification as a Senior Administrative Assistant in the Legal Unit. At all such times, defendant Maynard was acting within the scope and course of her official duties as such employee.	31. Complaint, at 1:22-27. Plaintiff's Answers to Defendants' Form Interrogatories (set one) no. 14.1, Ex. 1(b), at 6:15-22. Plaintiff's Answers to Defendant's First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 2:1-13.
32. Plaintiff sued	32. Plaintiff's

defendant Rossi for damages because her name appeared as a recipient of a copy ("cc") of the letter dated July 23, 1993, from defendant Maynard to plaintiff, and because defendant Rossi wrote plaintiff a letter dated October 22, 1993. Plaintiff had no other contact with defendant Rossi, does not know her and never heard of her.	deposition, Ex. 1(a)(7) and 1(a)(9), at 59:7-68:22. Plaintiff's Answers to Defendants' First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 3:15-4:11.
33. Plaintiff sued defendant Maynard because she wrote the July 23, 1993, letter to plaintiff and delivered a copy to	33. Plaintiff's deposition, Ex. 1(a) at 70:8-73:16.

defendant Rossi. Plaintiff has no other contact with defendant Maynard, does not know her and never heard of her.

CLAIM NO. 6, NO MERIT TO CLAIM FOR PUNITIVE DAMAGES:

(Complaint, paragraph XXII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points & Authorities In Support of Motion For Summary Judgment or Summary Adjudication, at p. 17.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
34. Defendant Maynard wrote to plaintiff on July 23, 1993, acknowledged receipt by the State Bar of plaintiff's letter to the State Bar dated	34. Plaintiff's deposition, Ex. 1(a), at 63:23-64:4, 70:8-73:16. Plaintiff's answers to defendants first set of special interrogatories (set

July 9, 1993, and indicated it had been referred to the State Bar's Office of General Counsel for reply. Defendant Maynard delivered a copy of her July 23, 1993, letter to defendant Rossi.	one) no. 1, Ex. 1(c), at 2:14-3:1.
35. By letter dated October 22, 1993, defendant Rossi wrote to plaintiff, acknowledged receipt of his letters to the State Bar dated July 9, 1993, and September 23, 1993, as well as his claim for damages dated October 7, 1993, and advised plaintiff of the statutory	35. Plaintiff's deposition, Ex. 1(a), at 59:7-68:22. Plaintiff's answers to defendants' first set of special interrogatories (set one) no. 1, Ex. 1(c), at 3:15-4:11.

(section 6070) and Rule of Court (958) bases for the State Bar's MCLE programs and procedures.	
36. At the time defendant Maynard wrote to plaintiff by letter dated July 23, 1993, the State Bar had already, effective July 19, 1993, placed plaintiff on administrative inactive status, as it had previously notified plaintiff it would by notices dated April 23, 1993, and June 29, 1993, which notices were received by plaintiff.	36. Plaintiff's deposition, Ex. 1(a), at 15:7-16:4, 17:1-19:21, 22:2-23:8, 24:3-25:5, 63:11-15, 65:8-24.
37. Other than the	37. Plaintiff's

correspondence mentioned in facts 34-36, plaintiff had no contact with defendant Rossi or defendant Maynard, did not know either of them and had never heard of them.	deposition, Ex. 1(a), at 60:13-61:21, 62:15-25, 66:4-12, 67:11-18, 71:1-25, 72:7-73:20.

CLAIM NO. 7, TORT CLAIM FOR DAMAGES AND AFFIRMATIVE DEFENSE NO. 2, DEFENDANT'S LICENSING ACTIVITY IMMUNITY UNDER GOVERNMENT CODE SECTIONS 818.4 AND 821.2 AND COMMON LAW QUASI-JUDICIAL AND LEGISLATIVE IMMUNITY FROM LIABILITY FOR DAMAGES:

(Complaint, paragraph XXIII and Answer, at 2:6-11) (See discussions in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pp. 15-16.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
38. Defendant State Bar is a state agency in the judicial branch of State government which serves as the administrative arm of the California Supreme Court in all matters relating to the admission, discipline and reinstatement of attorneys.	38. See fact 29 and the supporting evidence there listed.
39. At all times mentioned in plaintiff's complaint, defendants Rossi and Maynard were employees of the State Bar acting within the scope and course of their employment	39. See facts 30 and 31 and the supporting evidence there listed.

and official duties.

40. On or about October 13, 1993, plaintiff filed with defendant State Bar a "Claim of Damages".

40. Complaint, at 11:9-11. Admitted by defendants.

41. Plaintiff's Claim of Damages was denied by the Board of Governors of the State Bar on or about November 5, 1993.

41. Plaintiff's Complaint, at 11:9-11. Admitted by defendants

42. Both section 6070 of the Business & Professions Code and rule 958, California Rules of Court provide, inter alia, that a member who fails to satisfy the requirement of the State Bar's MCLE Program ". . . <u>shall be</u>

42. Business & Professions Code section 6070 and rule 958, California Rules of Court.

enrolled as an inactive member" of the State Bar under rules adopted by the Board of Governors of the State Bar. (Emp. added.)

43. Both section 6070 and rule 958 require the State Bar to adopt rules for and establish and administer a minimum continuing legal education program mandating that each member not exempt complete 36 hours of legal study within 36 month periods designated by the State Bar.

43. Business & Professions Code section 6070, rule 958, California Rules of Court.

44. Plaintiff may return to active status

44. MCLE Regulations sections 15.1-15.2.

simply by completing the required hours of MCLE study and furnishing proof of such compliance with whatever fees may be due, if any.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

LEW WARDEN,

Plaintiff,

vs. No. 734372-4

THE STATE BAR OF CALIFORNIA, KAHALA MOTOYAMA, LORNA MAYNARD, CAROLE ROSSI, et al.,

Defendants.

_____/

DEPOSITION OF LEW WARDEN

Thursday, August 18, 1994

Reported by:

TERRI FEVURLY

CSR #5238

NANCY SORENSEN

COURT REPORTING SERVICE

41 SUTTER STREET

SUITE 505

SAN FRANCISCO 94104

CSR #5982 (415) 986-4624

APPENDIX 3

LINE PAGE 11

21 Q. All right. Moving along, then, we will mark
22 this as next in order.
23 (A 17-page document entitled "California
24 Minimum Continuing Legal Education
25 Program Information, Rules and

LINE PAGE 12

1 Regulations, Guidelines, Continuing
2 Education Log" was marked as Defendant's
3 Exhibit No. 3 for identification.)
4 MR. BABCOCK: Q. Do you recognize this
5 document?
6 A. Is that the Exhibit C of your deposition? I
7 have (b) item is pamphlet–
8 Q. No, this is (b), a pamphlet or booklet
9 entitled "California Minimum Continuing Legal Education
10 Program."
11 A. That would be attached as Exhibit C to your

deposition materials or, rather, to your–

Q. Demurrer?

A. Demurrer materials, right.

No, I did not receive that either. I don't have any copy of that in the file, except what you sent me.

Q. And you have no independent recollection of ever receiving that in the mail?

A. First I knew about this program was people in the office talking about it. I really didn't know it was going on. I didn't receive that material. There was a lot of complaining going on about what the program was and ridiculous posture it put us all in.

Q. When was that complaining going on? When did

LINE PAGE 13

you first hear about MCLE?

A. A couple of years ago.

Q. '92?

A. It was at least a year before you sent me

notices concerning it. It was about a year.

Q. Okay. And tell me a little bit about that.

You found out about it literally–

A. I heard about the program from other lawyers that I'm talking to, and everybody was complaining about it, as I recall, and they were complaining to me what they had to do, and what they did, and how ridiculous the programs were and what a waste of time it was. I got the impression that I had three years within which to either comply with the program or get out of the Bar, and so I figured I could practice my profession for three years and by that time I would either be dead or too old to work anyhow. Turned out not to be the case. Sometimes you are disappointed in life.

. . .

But let me get this straight, then. So, in 1992 you were aware, then, that you had three years to

LINE PAGE 14

complete this?

A. I can't complain. . . I can't assert the date positively. It could have been in '93, but it was certainly before I started writing to you about it, and

. . .

. . . But my intention was not to comply, because I had three years in which to continue, so why bother? By that time I figured I would be retired.

LINE PAGE 15

Q. So, at least, prior to getting notices that you were not in compliance with MCLE, is it a fair statement to say that you, at least, were aware of the MCLE program and that there were certain requirements that applied to you?

A. I was aware that I had three years within which to either comply with the educational program that I and all my associates disagree with profoundly or retire, stop practicing law.

Q. And if you didn't?

17 A. Distinct surprise to me to receive your
18 notices that my number is up whenever it was last year.
19 Q. When you say that you had to stop or retire,
20 you were aware, then, that if you didn't comply, that
21 one of the sanctions might be that you would be placed
22 inactive?
23 A. Either that or I could challenge the program,
24 which I chose to do.
25 Q. But you knew one of the sanctions was that you

LINE PAGE 16

1 could be placed inactive?
2 A. Whether I could be placed inactive legally or
3 not, but I understood there would be an attempt to
4 impose such a sanction.

LINE PAGE 17

1 Q. Looking at. . . I would like to get the next
2 exhibit in order, which corresponds to (c) on the Notice
3 to Produce. It's a letter dated April 23rd, 1993 from
4 defendant State Bar to plaintiff Lew Moore Warden, Jr.

(A 1-page letter from The State Bar of California to Lew Moore Warden, Jr., dated 4-23-93, was marked as Defendant's Exhibit No. 4 for identification.)

MR. BABCOCK: Q. Have you, did you receive a copy of this item that's next in order?

A. Is there another page to it? I don't know. I think I got that. My memory is I did get a letter dated April 23. . . .

. . .

A. I've got it. I made the note on the file that I paid the fee, non-compliance fee. I had paid that already by that time and–

Q. So I'm clear on this, looking at what we've marked as State Bar 4 to this deposition, this document

LINE PAGE 18

dated April 23rd, '93, you are looking in your file and you received this document?

A. Yes.

. . .

Q. Let me just go through these exhibits. I've got some copies of your letters that I want to talk about.

The next one in order is State Bar 5, which corresponds to, I believe, request (d) from the Notice of Deposition. It's a letter of June 29th, 1993.

(A 1-page letter from the State Bar of California to Lew Moore Warden, Jr., dated 6-29-93, was marked as Defendant's Exhibit No. 5 for identification.)

MR. BABCOCK: Q. Let me just show you a copy of that. Do you have a copy of what we will call State Bar 5?

A. I believe I do, yeah.

Q. You received that letter, did you?

A. Yes.

Q. And you read it?

19 A. Yeah.

20 Q. And you understood it?

21 A. Yeah.

LINE PAGE 21

. . .

4 Q. Again, is it fair to say that at this point

5 you determined that you were not going to fill out the

6 compliance card?

7 A. I was not going to participate in the program.

8 The compliance card, I believe, as I recall, gave me one

9 option, to say I complied.

10 Q. Right

11 A. Since I hadn't complied, there's no occasion

12 to fill out the card.

. . .

22 A. I resolved at that time to either get you to

23 back off on it by conference or to take whatever steps

24 had to be taken to litigate it.

LINE PAGE 22

. . .

. . . It's a letter of July 30th, 1993 to Lew Moore Warden at 114 Parrott Street, San Leandro.

(A 1-page letter from The State Bar of California to Lew Moore Warden, Jr., dated 7-30-93, was marked as Defendant's Exhibit No. 7 for identification.)

MR. BABCOCK: Q. Do you have a copy of this item, this letter?

A. I've got one, July 23rd, that came before that.

Q. You do?

A. Let me see that one. From Lorna Maynard.

Q. Oh, right, I've got that one there, too. Let's go in order here on this one. Can we stick with this one, the one July 30th?

A. July 30th?

Q. Right.

20 A. Yes, I got that.

21 Q. Okay. That's what we marked as State Bar

22 Exhibit 7 to this deposition. And you have this letter

23 in your file?

24 A. Yes.

25 Q. And you received this letter?

LINE PAGE 23

1 A. Oh, yeah.

2 Q. And you read it?

3 A. Oh, yeah.

4 Q. You understood it?

5 A. I did indeed.

6 Q. You understood that this letter had placed you

7 in inactive status, correct?

8 A. Yes. They put me on a status that caused me

9 to look up and see what inactive status meant besides

10 disbarment, if anything.

LINE PAGE 24

. . .

12 Q. Let's go to that letter. That's a letter

13 dated July 23rd?

14 A. July 23rd, right.

15 Q. And there is a copy of that letter that you

16 have?

17 A. Correct.

18 Q. Right. And this would be, we will call this

19 State Bar 8.

20 (A 1-page letter on the letterhead of The

21 State Bar of California from Lorna

22 Maynard to Lew Warden, dated 7-23-93, was

23 marked as Defendant's Exhibit No. 8 for

24 identification.)

25 MR. BABCOCK: Q. You received this letter

LINE PAGE 25

1 from Lorna Maynard, is that right?

2 A. Right.

3 Q. Do you have a date stamp when you receive it

4 in your office?

A. No.

Q. Okay. And what did you take to be the meaning of this letter?

A. That we have a meeting and discuss it. Somebody in the hierarchy here would sit down and look at the situation and look at my grievances and have a conference of some kind on it.

Q. And did you believe that this excused you from the requirements that had been set forth in the previous letters?

A. I believe that I was excused in the requirement by virtue of the unconstitutionality of the statute.. . .

LINE PAGE 36

. . .

Q. When you heard about MCLE in 1992–

A. Sometime in there, yes. I'm not quite sure of the date, but it was in that period of time.

Q. Did you write to any member of the Board of

21 Governors and complain about it?

22 A. No.

23 Q. Did you write to the Supreme Court?

24 A. No.

25 Q. Did you write to your legislator?

LINE PAGE 37

1 A. No. I have since then, but. . .

2 Q. But that's all been subsequent to your–

3 A. Oh, yeah.

4 Q. –suspension?

5 A. Yeah. I didn't really appreciate the

6 monstrousness of the organization until I got deeply

7 into it.

LINE PAGE 100

. . .

15 Q. Why do you think you have a right to a hearing

16 in this matter?

17 A. Because my license to earn my living was

18 suspended without a hearing.

19 Q. Even though you were advised well in advance
20 of your suspension that this was a requirement to
21 practice law?
22 A. Yeah, but I think the hearing before a judge
23 would have created a record in which the issue of the
24 constitutional [sic] statute would have been addressed.

. . .

LINE PAGE 103

1 Q. You never showed up at an MCLE-sponsored
2 lecture?
3 A. And never will. That I promise you.

SUPREME COURT OF THE STATE OF CALIFORNIA

LEW WARDEN Plaintiff/Appellant v. THE STATE BAR OF CALIFORNIA et al., Defendants/Respondents	)	No.

PETITION FOR REVIEW BY THE STATE BAR OF CALIFORNIA AND TRANSFER OF RELATED CAUSE PENDING BEFORE SAME COURT OF APPEAL AND REQUEST TO EXPEDITE REVIEW AND DISPOSITION

From the Opinion of the Court of Appeal
First Appellate District, Division Five

On Appeal from the Judgment of the Superior Court
of the State of California, County of Alameda

Honorable James R. Lambden, and Sandra L. Margulies

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APPENDIX 4

[EXCERPT ONLY]

PETITION STARTING ON PAGE 8

. . .

It is undisputed that the MCLE program applies to "almost all California attorneys, while exempting . . . a relatively small number" from its educational requirements. (Opinion, pp. 13-14; see also conc. and dis. opn. Of Haerle, J., at p. 4 [noting that as to the three exemption categories that the court found unconstitutional, "common sense tells us [the] figure could not be more than a few hundred"].) Indeed, the State Bar's official records show that of the total number of exemptions granted to active members in the period 1994-1996 (based on the sum of year-end figures),[13] only 144 (.14%) members were exempted as retired judges, 48 (.05%) as officers and elected officials of the State, and 376 (.4%) as

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[13]Pursuant to California Rule of Court, rule 958(b), membership of the State Bar is divided into three compliance groups, so that completion of the MCLE credit hours and reporting by bar membership are staggered over three years. The total here are derived from the sum of exemptions in each category at the end of each year during the period 1994-1996.

professors of accredited law schools.[14] Similarly, only a small number of lawyers (1,408 to date) have been enrolled in administrative inactive status for failing to comply with the MCLE requirements. In contrast, as the Court of Appeal indicated, almost all active bar members have complied. In addition, official bar records show that an industry of 1,138 certified providers has developed to meet MCLE demands.[15]

. . .

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[14]The largest number of exemptions were for those in the categories of federal or state employees–2,477 (2.3%) and 1,611 (1.5%) respectively–the two categories which the Court of Appeal indicated were constitutional. (Opinions, at p. 11). The relatively small number of exempted members is furthered evidenced in the record of the related appeal in Greenberg v. State Bar, Appellants' App. In Lieu of Clerk's Tr., at pp. 600-602.

[15]This Court may take judicial notice of all the foregoing matters under Evidence Code section 452, subdivisions (c), (g) & (h). Evid. Code, §459; Smith v.State Bar (1989) 212 Cal.App.3d 971, 975-976.